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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

FROM DECEMBER 4, 1899, TO FEBRUARY 5, 1900.

REPORTED BY

M. R. SMITH, of the Farmington Bar,

AND

BEN ELI GUTHRIE, of the Macon City Bar,

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JUDGES OF THE ST. LOUIS COURT OF APPEALS.

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HON. WILLIAM H. BIGGS, } *Judges.*
HON. HENRY W. BOND, }

JOHN H. MURPHY, *Clerk.*
M. R. SMITH, *Reporter.*

JUDGES OF THE KANSAS CITY COURT OF APPEALS.

HON. JACKSON L. SMITH, *Presiding Judge.*
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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1899.

(Continued from Volume 81.)

PETERS SHOE COMPANY et al., Respondents, v. RICHARD T. ARNOLD et al., Appellants.

82	1
182	130
82	1
86	45
82	1
99	1395

Kansas City Court of Appeals, December 4, 1899.

1. **Fraudulent Conveyances:** USURY: SUBSEQUENT CORRECTION. Although the debt secured by a mortgage be usurious and therefore invalidating the mortgage, yet the parties may repudiate such usury and correct the mistake by proper agreement.

2. ———: FICTITIOUS DEBT: SUBSEQUENT CORRECTION. Where there is a fictitious element in a debt secured by a mortgage, the parties thereto may, prior to the intervening rights of creditors by a subsequent agreement purge the action of such fraud.

3. ———: BUYING DEBTS OF GRANTOR: CREDITOR'S SPECIFIC RIGHT: EQUITY. The fact that the mortgagee with the proceeds of sale bought other debts of the mortgagor prior to an unsecured creditor's obtaining judgment, will not render the mortgage fraudulent since no creditor can be delayed until he has a specific right to satisfaction out of property withdrawn from his reach, and, until such event, equity can not interfere as the creditor still has his remedy at law.

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Appeal from the Nodaway Circuit Court.—*Hon. C. A Anthony*, Judge.

REVERSED.

W. C. Ellison for appellants.

(1) The first finding is that there was fraud because McIninch took possession of the goods and used some of the proceeds of the sale thereof, with Arnold's consent, to pay debts not included in the mortgage. What if McIninch and Arnold did do this? Had not Arnold a right to prefer other creditors? This had been accomplished before respondents brought suit. Who but the mortgage creditors had a right to complain? When this was done, respondents had no special claim to or on the goods, but were in the position of a general creditor. (2) Another finding of fraud, in substance, is that McIninch was endeavoring to collect his just claims and that in doing so, he and Arnold were hindering other creditors. This needs no comment. (3) In conclusion, we ask the court to contrast the finding and decree with the allegations of the petition. The finding and decree is not responsive to a single allegation of the petition. The petition, in truth, states no cause of action at all. (4) Assuming that the $2,500 note was usurious in that its terms authorized the interest to be compounded quarterly, it is an admitted fact that no payment was actually made of interest thus compounded, and it is claimed by appellants that the deed of trust, in the provision hereinbefore referred to in regard to the interest, purged the transaction of its alleged usurious features. 27 Am. and Eng. Ency. of Law, p. 964, *et seq.*

Ira K. Alderman and *E. A. Vinsonhaler* for respondents.

(1) Where an instrument by honest mistake fails to express the contract of the parties, a court of equity would

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correct it, and so may the parties; but equity does not aid parties guilty of fraud, nor approve their act when they attempt its correction. Dry Goods Co. v. Grocery Co., 68 Mo. App. 290, 297. As in cases where the instrument is tainted with constructive fraud, possession taken cures the defect, but not when there is actual fraud. McKinney v. Wade, 43 Mo. App. 152. (2) Our statute renders chattel mortgages securing contracts tainted with usury absolutely void. Session Acts, 1891, p. 170. When such statute is in force, no subsequent purgation will render such security valid. Johnson v. Griffin, 55 Ga. 691; 27 Am. and Eng. Ency. of Law, 967; Jackson v. Cassidy, 68 Texas, 282.

ELLISON, J.—This proceeding is in equity praying that a receiver be appointed to take charge of a lot of merchandise and for an accounting. Plaintiffs obtained a decree and defendants appealed.

Defendant Arnold was engaged in the mercantile business and was the owner of a stock of merchandise. He was indebted to these plaintiffs and various other parties, among them being defendant McIninch. On April 20, 1897, he executed to McIninch a chattel mortgage on the stock of goods securing payment to the latter of two promissory notes, one for $2,500 and the other for $600. And also securing the payment of another note executed to him for $1,350. No part of the latter note was owing to McIninch, but something more than $1,000 of it was owing to other creditors of Arnold, who are also defendants herein, leaving near $350 as fictitious indebtedness.

It is conceded that there was evidence tending to show that this fictitious portion was inserted with intent to hinder, delay or defraud other creditors. Though there was evidence tending to show that the act was done with fair intent—that not having the data at hand at the time the mortgage was executed, to show the amount due these other creditors, the

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sum of $1,350 was fixed upon with the understanding that if it should turn out to be too much, the excess should be credited. In forming our conclusion as to the merits of the case we shall concede that the excess was known to be fictitious and was added with a view to hinder and delay other creditors. The note for $2,500 by its terms drew usurious interest, though none, in fact, was collected. McIninch recorded the mortgage, closed the store, took an invoice and posted a notice that: "This store is closed by mortgagee for invoice." When opened for business a muslin sign, 30 or 40 feet long, was put up in the mortgagee's name. It appears that handbills were also circulated announcing the change. On the other hand defendant Arnold and his former employees were kept in McIninch's employment and had practical charge of the store, though McIninch was also there from time to time and sale moneys amounting to $1,016 were deposited in his name, and applied by him in full discharge of the $600 note and to the purchase by him of some other claims against Arnold by agreement with the latter. A small sum still remaining, he applied it as a credit on the note for $2,500.

Afterwards, on May 28, 1897, Arnold and McIninch becoming aware that the note for $2,500 was usurious and that the debts for which the $1,350 was included in the mortgage did not amount to that sum, as before stated, the former executed a chattel deed of trust on the same property in order to eliminate the usurious feature of the $2,500 note and to insert separately the exact sum due the creditors, for which the note for $1,350 had been given in the first mortgage, thus relieving the transaction of the fictitious indebtedness. This chattel deed was executed to W. T. Whiteside as trustee and he went into possession.

Near six weeks after the execution of this deed of trust, these plaintiffs obtained judgment on their claims before a justice of the peace and shortly thereafter, on July 21, begun the present proceedings. On the twenty-eighth of July,

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1897, the parties made and filed the following agreement: "It is stipulated and agreed between the plaintiffs and defendants to the above entitled cause as follows, to wit:

"That the defendant, W. T. Whiteside, trustee under a certain deed of trust executed by the defendant, Richard T. Arnold, as grantor, on or about the 28th day of May, 1897, shall continue in the possession of the property conveyed in said deed of trust and may sell and dispose of the same under the terms and conditions thereof.

"That the said W. T. Whiteside shall, until the final determination of this suit, retain in his possession sufficient of the proceeds which have come into his hands, or which he may hereafter receive in the execution of his trust to cover the amounts of the claims of the several plaintiffs as set up in the petition, together with the costs of this action should the final judgment be in favor of the plaintiffs.

"The plaintiffs upon their part in consideration of the foregoing agree to withdraw their application for a temporary receiver and to make no further application for the appointment of a receiver during the pendency of this action.

"Nothing herein is to be construed as affecting in any manner the rights of the parties to this action upon the final hearing thereof."

An examination of the briefs and argument of the respective counsel discloses that there is practically no substantial difference between them as to the facts which have any application to the controversy. There are three main points of attack made by plaintiffs. First, that there was usury in the $2,500 note given by Arnold to McIninch. Second, that a part of the $1,300 note was not a *bona fide* indebtedness against Arnold. Third, that a portion of the proceeds of the sale made by McIninch while holding under the original chattel mortgage was applied, with Arnold's consent, to the purchase, or payment of claims of other creditors who were not included in the mortgage.

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1. In regard to the first proposition, the usury consisted in compounding a legal rate (8 per cent) more than once a year, viz.: quarterly. This was corrected in the subsequent chattel deed of trust by reciting that it was only intended to compound annually and "that said interest should be and shall be compounded annually." Without going into the question whether plaintiffs have the legal right to raise the question of usury (on which subject see American Rubber Co. v. Wilson, 55 Mo. App. 656) and assuming they have that right, it is clear that it can not avail them for the reason that the parties to the transaction before plaintiff begun this proceeding, wiped out the usury by the stipulation in the deed of trust. While the taint of usury will follow an indebtedness through all its renewals however remote, yet the parties concerned are not incapacitated from legalizing the illegal contract by withdrawing from it the element which made it unlawful. This might be done in any appropriate manner the parties agree upon, the usury being refunded by the one and accepted by the other, when it has been paid. In this case no usury had in fact been collected and therefore there is nothing to refund. But that the contract may be purged of its unlawful element is well established. "Courts of justice will not shut the door in the face of the penitent; and hence it has been decided that although a contract be in its inception usurious, a subsequent agreement to free it from the illegal incident shall make it good." DeWolf v. Johnson, 10 Wheat. 392; Taylor v. Morris, 22 N. J. Eq. 609; Warwick v. Dawes, 26 N. J. Eq. 548. The cases of Johnson v. Griffin, 55 Ga. 691, and Jackson v. Cassiday, 68 Texas, 282, are not in point.

2. As to the second point: The parties inserted in the deed of trust the proper sum due each creditor by name and amount before these plaintiffs could have been in any manner affected. They had not obtained their original judgments and did not institute this proceeding for some time afterwards. The position taken by plaintiffs is tantamount to an assertion

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that if a debtor once conveys in fraud he can never correct it, even though with the consent of his fraudulent grantee. We think the position is unsound. Sir Edward Coke did say that where there was actual fraud nothing afterwards can "anyways salve and amend the matter." But it is stated in 2 Bigelow on Fraud, 408, that the position thus asserted should not be accepted too broadly—that a limitation of necessity must be allowed, "where after the conveyance has been made and before any steps have been taken against it by the creditor, a reconveyance is made; this is proper, and there is nothing now for the statute to operate upon, considered *civiliter*. The same would be true if the grantee should repudiate the transaction entirely, and then obtain the property by lawful treaty." There are cases where the wrongdoer has attempted to abandon the fraud after a creditor's right has intervened by attachment, or other lien and he has always been denied the right. But the strong implication in each of these adjudications is that if he had repented before the assertion of an intervening right he would have been allowed to do so. Sutherland v. Bradner, 116 N. Y. 410; Farrow v. Hays, 51 Md. 498; Whittaker v. Williams, 20 Conn. 98; Smith v. Conkwright, 28 Minn. 23; Porter v. Williams, 9 N. Y. 152. That fraud may be purged by the repentance of the parties to it before the creditor intervenes is supported by every good reason, and it has been frequently decided. Thomas v. Goodwin, 12 Mass. 140; Hutchins v. Sprague, 4 N. H. 469; Bank v. Haskins, 3 Met. 332; Merrill v. Englesby, 28 Vt. 150; Ingraham v. Wheeler, 6 Conn. 277. The case last cited was much like the one at bar. In that case there was an assignment by the debtor to a third party, directing the payment of some creditors in full and of others upon condition that they would accept a certain per cent of their claims in full settlement. If not they should not be paid anything. This deed was void as a fraud upon the creditors thus attempted to be forced to settlement and as providing for a portion of the

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property for the assignors' benefit in case it was not accepted by the creditors. Afterwards he concluded not to undertake to enforce the fraudulent portion of his deed and made a new assignment eliminating the fraudulent portions of the first. Afterwards a creditor attached and the court held the new assignment was not tainted with the fraud of the first and that it was superior to the attachment.

The case of Carll v. Emery, 148 Mass. 32, while not like the one under consideration in its facts is yet enough like it in principle, to serve as authority for defendant's position. There a debtor transferred property to another in fraud of his creditors of which the transferee had knowledge. Afterwards he gave notice to the transferee of a change of purpose and an intention to use the property for his creditors. The court said that he might "recede from the transaction on notice to the other party, repossess himself of his property, and devote it to its proper purposes." And "That a fraudulent transaction may be purged of the fraud by the subsequent action of the parties is well settled."

Counsels' brief concedes the position that constructive fraud may be purged, but deny that actual fraud can be, and cite the cases of Dry Goods Co. v. Grocery Co., 68 Mo. App. 290, and McKinney v. Wade, 43 Mo. App. 152. We can not find where those cases apply to the question, and feel confident that the law allows a *locus poenitentiae* to the fraudulent transgressor at any time before the intervention of interested third parties.

3. Much of what has been already said applies to the third proposition. After eliminating that portion of the note for $1,300 included in the first mortgage which was fictitious nothing remained but *bona fide* claims. The debts paid out of a portion of the proceeds of sales made before the deed of trust was executed were just claims owing by Arnold. They were paid while plaintiffs were mere general creditors and before they had taken any action in the premises. It was no

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concern of plaintiffs. They had not interfered. More than this, they could not have interfered before reducing their claims to judgment. Wait on Fraudulent Conv., secs. 52, 73, 347. "No creditor can be said to be delayed, hindered or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance." Bump on Fraudulent Conv., secs. 535,538. Equity is not the forum in the first instance for the collection of simple contract debts. Ib. And it may be said generally of this proceeding that after all that plaintiffs have shown to be true, they had their full remedy in the ordinary procedure at law.

The foregoing views make it unnecessary to consider other suggestions found in briefs. The judgment should have been for defendants instead of plaintiffs and it is accordingly reversed. The other judges concur.

JOHN SMITH by Next Friend, Respondent, v. JACOB DOLD PACKING COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Negligence: DUTIES OF LAND OWNER: TRESPASSER: INVITATION: INFANT. A lessee of private premises with only permission to pile ashes and cinders thereon is not liable to an infant who is burned while running over said ashes to reach boys fishing at a near by pond on the premises and is not guilty of negligence in not fencing the pond, even though it may tend to attract children. Parties entering such private premises without invitation are trespassers whether old or young, and the proprietor owes them no duty save not to negligently injure after discovering them. Cases considered and distinguished.

Appeal from the Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

REVERSED AND REMANDED.

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Lathrop, Morrow, Fox & Moore for appellant.

(1) The court erred in refusing to sustain defendant's demurrer, and in refusing to give a peremptory instruction to find for the defendant. Barney v. Railroad, 126 Mo. 372; Moran v. Car Co., 134 Mo. 642; Overholt v. Vieths, 93 Mo. 422; Butz v. Cavanaugh, 137 Mo. 511; Klix v. Nieman, 68 Wis. 271; Gillespie v. McGowan, 100 Pa. St. 144; Richards v. Connell, 63 N. W. Rep. 915; 45 Neb. 367; Mergenthaler v. Kirby, 28 Atl. Rep. 1065; 79 Md. 182; Benson v. Traction Co., 26 Atl. Rep. 973; 77 Md. 535; Oil Co. v. Martin, 70 Texas 400; O'Connor v. Illinois Central, 10 S. Rep. 678; 44 La. Ann. 399; Frost v. Railroad, 9 Atl. Rep. 790; 64 N. H. 220; Sterger v. Vansiclen, 30 N. E. Rep. 987; 132 N. Y. 499; Ratte v. Dawson, 52 N. W. Rep. 965; 50 Minn. 450; McGinnis v. Butler, 34 N. E. Rep. 259; 159 Mass. 233; Clark v. City of Richmond, 5 S. E. Rep. 369; 83 Va. 355; Clark v. Manchester, 62 N. H. 577; Charlebois v. Railroad, 91 Mich. 59; Omaha v. Bowman, 72 N. W. Rep. 316; Murphy v. Brooklyn, 23 N. E. Rep. 887; 118 N. Y. 575; Grindley v. McKechnie, 40 N. E. Rep. 764; 163 Mass. 494; Peters v. Bowman, 47 Pac. Rep. 113; 115 Cal. 348; Sendal v. Boyd, 75 N. W. Rep. 735; Dobbins v. Railroad, 38 L. R. A. 573; Greene v. Linton, 27 N. Y. Supp. 891; Cusick v. Adams, 21 N. E. Rep. 673; 115 N. Y. 55.

R. D. Brown and *Ward & Hadley* for respondent.

(1) Under the facts that the jury must be assumed to have found to be true, the plaintiff was entitled to recover. Schmidt v. Distilling Co., 90 Mo. 284; Fink v. Furnace Co., 10 Mo. App. 61; Crafton v. Railway, 55 Mo. 580; Schooling v. Railway, 75 Mo. 518; Nagel v. Railway, 75 Mo. 653; Butz v. Cavanaugh, 137 Mo. 503; Voegeli v. Marble & Granite Co., 49 Mo. App. 653; Leeright

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v. Ahrens, 60 Mo. App. 118; Pekin v. McMahon, 154 Ill. 141; Stendel v. Boyd, 67 Minn. 278; Omaha v. Richards, 68 N. W. Rep. 628; Bronson v. Labrot, 81 Ky. 638; Burge v. Gardener, 19 Conn. 507; Railroad v. Stout, 17 Wall. 657; Railway v. Fitzsimmons, 22 Kan. 686; Townsend v. Mather, 9 East. 277; Lynch v. Murden, 1 Queen's Bench 29; Powers v. Harlowe, 153 Mich. 507; Wesinfield v. Levis, 45 La. 63; Wharton on Neg., secs. 112 and 824; Bruce v. Water Co., 3 Am. Neg. Rep. 392; Briggs v. Wire Co., 5 Am. Neg. Rep. 335; Railroad v. McDonald, 152 U. S. 262; Thompson on Neg., p. 305.

GILL, J.—As will be seen by the accompanying plat, the packing houses of the Dold Packing Company at Kansas City are located in what is known as the "West Bottoms" and at the northeast corner of Ninth and Wyoming streets. At the north end of its property the packing company has its engine house where several boilers and furnaces are had to furnish the power for the machinery. Immediately north of this lies a large tract of lowland, unoccupied except by several railroad tracks, and running to the Missouri river. This lowland is in times of high water overflowed, and when the tide recedes there is ordinarily left some small pools or ponds. At the time in question (August 10, 1896) this ground was open and uncovered by water, except that a pond of water was left as indicated on the plat, some one hundred and fifty to two hundred feet north of the defendant's engine house and a like distance north of the northern end of Wyoming street. This land, too, is unplatted, having no streets, alleys or highways through it, and at the time of the accident, hereinafter mentioned, was owned by the Suburban Belt Company. Under consent of this owner the Dold Packing Company had been in the habit of dumping on this vacant ground the ashes and cinders taken from its engine house, and they were deposited in a large heap near the pond. From plain-

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tiff's evidence it would seem that these cinders and ashes continued to burn and smolder in this heap.

It seems that the boys of the neighborhood were in the habit of resorting to the pond, in question, to fish and swim. On August 10, 1896, this plaintiff (a boy about four years old) was standing near the pond watching other boys fishing. One of these caught a fish, and offered it to the boy that should first get to him. Thereupon this plaintiff, in the effort to get the fish, attempted to run across the ash heap, and in doing so his feet broke through the outer crust and went into the hot ashes or smoldering fire from which he received the personal injuries complained of in this suit. In an action for damages plaintiff recovered and defendant appealed.

After a patient consideration of the record in this case and the numerous authorities bearing thereon, we feel bound to reverse the judgment and to hold that under the conceded facts plaintiff can not recover. The action is grounded on the alleged negligence of the defendant in creating and maintaining the unprotected and unguarded pile of hot ashes and cinders near the pond of water which was attractive to, and frequently visited by the boys of that vicinity. The question then is, whether or not the facts disclosed by the record (and which we have substantially set out in the foregoing statement) show that defendant failed to perform a duty which at the time it owed to the plaintiff. We think they do not. Unquestionably now the plaintiff was a trespasser at the place where he was injured. He had no right there, and the defendant nor the owner of the property owed him no further duty than not to wantonly injure him after discovering his presence. It is an old and well settled principle of law that one is under no obligation to keep his premises in a safe condition for the visits of trespassers. When such persons enter unbidden and unsolicited on the lands or premises of another, they do so at their peril; the owner is not bound to look after the safety of such intruders and to protect them

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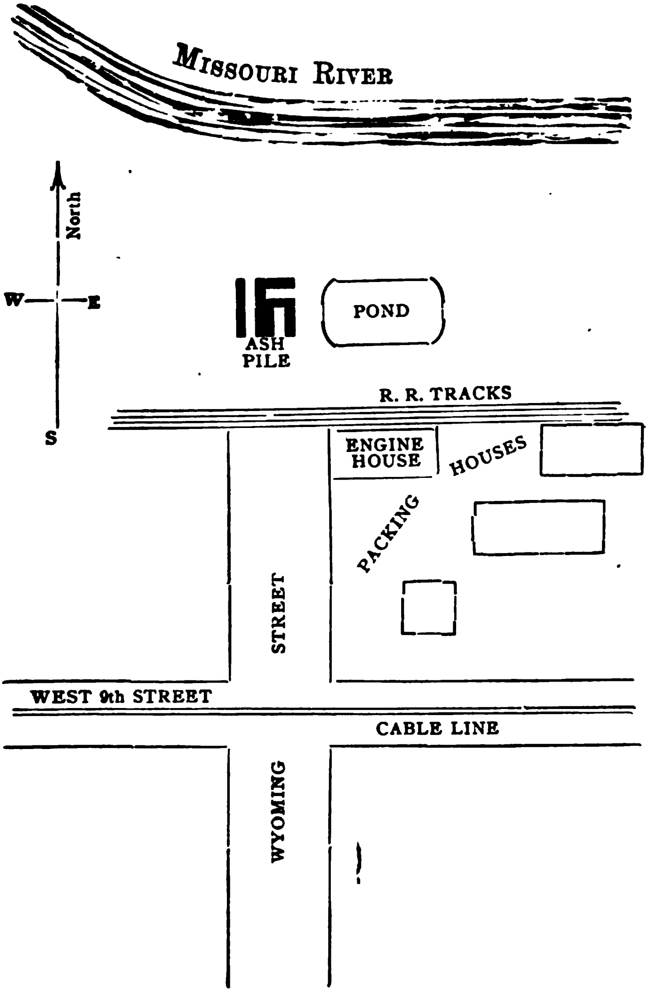
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from dangers. If, however, there be an invitation, express or implied, from the owner or proprietor to the other party to enter on the premises, then such party is not a trespasser and the owner or proprietor is bound to exercise ordinary diligence to protect the visitor. But there is no implied invitation when one's entrance upon dangerous premises is simply unopposed by the owner. Cooley on Torts, 606 (side page). And this is the rule, too, whether the intruder be an infant or an adult.

The only exception found in the authorities seems to come from what are known as the "turn-table cases," where it has been held to be actionable negligence for a railroad company to leave such machinery unfastened and exposed to the curiosity of playing children. Nagel v. Railway, 75 Mo. 653, and others that might be cited. The correctness of these decisions has been often denied by some of the best courts of the country. Daniels v. Railroad, 154 Mass. 349, and numerous authorities there cited; and even indirectly questioned by a late decision in this state. Barney v. Railway, 126 Mo. loc. cit. 387. At all events, I think it may be safely said that the courts of this and other states are inclined to confine the doctrine of the "turn-table cases" to the narrowest limit. It seems that if the "turn-table cases" can be justified at all, it must be because the machine is an attractive danger—one calculated in its make-up to excite the curiosity of children and to decoy them into its use, and that he who erects and maintains it, knowing it to be an attractive and dangerous machine, should exercise reasonable care to protect children likely to meddle with it. Here, however, appears the weakness of counsels' contention that these "turn-table cases" support plaintiff's claim, for it is conceded that the defendant packing company did not create or maintain any attractive danger. It is not pretended that this plaintiff and other children were drawn to the locality by reason of any attractiveness in the ash pile, or that the defendant had anything to do with creat-

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ing or maintaining the pond of water. Defendant had no right to fence in or inclose the pond or the ash-heap—it had only the right to dump its ashes and cinders at that point.

In Overholt v. Vieths, 95 Mo. 422, the mother sued for damages by reason of her infant child being drowned in an unfenced and unprotected pond on the defendant's lot. The court held that no case was made, quoting with approval from Shearman & Redfield on Negligence that "the occupant of land is under no obligations to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous, under ordinary circumstances, to persons passing upon the way and using ordinary care to keep upon the proper path; in which case he must take reasonable precautions to prevent injuries happening therefrom to such persons." The opinion, while perhaps recognizing the exception to the above rule, as made in cases of exposed and dangerous machinery attractive to children, denies the liability of a lot owner under the facts disclosed in that case. If in the case in hand the plaintiff had fallen into the unprotected pond and been thereby injured, then it would be on "all fours" with the Overholt case just cited.

In the opinion above noticed the case of Gillespie v. McGowan, 100 Pa. St. 144, was cited with approval. In that case the defendant owned a vacant and unfenced lot in the suburbs of Philadelphia on which there was an uncovered and unprotected well. The lot was a common place of resort and play for children of the neighborhood. Plaintiff's boy, less than eight years of age, fell into the well and was drowned. In a suit by the father, it was held that the boy was a trespasser and defendant not liable on any charge of negligence. It was there said, quoting from an English case, that while "a man must use his property so as not to incommode his neighbor, yet the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risk incident to it. If it

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were not so a proprietor could not sink a well or a saw pit, dig a ditch or a mill race, or open a stone quarry or a mine hole on his own land except at the risk of being made liable for consequential damage from it, which would be a most unreasonable restriction of his enjoyment." The Overholt case was cited and approved in Witte v. Stifel, 126 Mo. 295; in Barney v. Railway, 126 Mo. 372, and in Moran v. Pullman Palace Car Co., 134 Mo. 641.

In the case last cited the plaintiff's infant son was drowned while bathing in a pond made by quarrying rock on a square of vacant ground belonging to defendant. This pond, too, was unprotected and was habitually resorted to by children. It was decided that the defendant was not liable. In the Barney case it was said that "a landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty where none otherwise exists."

Richards v. Connell, 45 Neb. 467, is a case similar to Moran v. Car Co., *supra*, and it has met, too, with the approval of our supreme court. The syllabus, which is a correct reflection of the decision, reads: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity." In that case the boy fell into the pond from a section of a sidewalk, which he was using for a raft, and was drowned. Held the defendant was not liable. It was there said that the boy "was not upon the land of the defendants, where he was drowned, by express or implied invitation for any purpose. The fact that the ground was uninclosed, and that the deceased and people at their pleasure went there without objection, was not an invitation; and from that fact alone no license can be inferred. The fact that the person who suffered injury and death was

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an infant child does not change the question nor create a liability against the defendants where none would have existed in case of an injury to an adult person under similar circumstances."

Hargraves v. Deacon, 25 Mich. 1, is a very well considered and instructive case. There the plaintiff's son, a child of tender years, fell into an uncovered cistern on the premises of the defendant and was drowned. Recovery was denied—the court announcing the doctrine that "owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, where the person injured was not on the premises by permission, or on business, or other lawful occasion, and had no right to be there." In that opinion the learned judge (Campbell) clearly shows that the owner of the property occupies the same attitude towards a trespassing infant as towards an adult, and under no further obligations. After satisfactory reasoning the court there concludes that no such negligence of the owner or proprietor committed on his own premises "can be made the ground of damages, unless the party injured has been induced to come by personal invitation or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there." "We have found," says the court, "no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant * * * A person incurs no duties towards persons by not warning or driving them from his premises and they go there, if mere volunteers and without invitation, at their own risk."

The case of Klix v. Nieman, 68 Wis. 271, is also in point and had been more than once cited with approval by our supreme court. So, too, in the case of O'Connor v. Railroad,

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44 La. Ann. 339, the supreme court of Louisiana learnedly discusses the same matters and arrives at the conclusion reached in the foregoing decisions.

In this discussion we have confined ourselves to the decisions of our state supreme court and such other authorities as have from time to time met its approval. And in the light of these it seems to us that the plaintiff has wholly failed to establish a right of recovery. The defendant was at the time only exercising the right to deposit its cinders and ashes on private property—at a place where the plaintiff had no right to be, where he was an intruder, and to whom the defendant owed no duty, except not to intentionally or wantonly injure the plaintiff. And as to the pond, the alleged attraction, the defendant was in no way responsible, since it neither created nor maintained it. But if it had done so, still, under the cases above cited, said pond is not to be treated as an attractive danger within the meaning of the "turn-table cases." Neither can defendant be held for setting a trap to catch boys or other intruders for there is no pretense that there was any such intention when the ashes and cinders were dumped on said private grounds. The doctrine which holds one responsible for spring guns, dead falls, man-traps and the like has no application to the facts of this case. Klix v. Nieman, *supra.*

We are fully aware that there are some decided cases which appear to sustain plaintiff's claim. The case of Railway Co. v. McDonald, 152 U. S. 262, is not so clearly in point as at first reading might appear. In some respects it is similar to the case at bar. The boy there was injured by getting into a smoldering and unguarded pile of slack at the entrance to a coal mine, and he was allowed to recover. But in that case it seems that by an act of the Colorado legislature the defendant was required to fence in the slack thrown from the mine. Hence it was decided that the company was guilty of negligence, in view of the statutory obligation to fence. Much, however, of the opinion, we are free to say, tends to

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support the plaintiff's claim here. In view, however, of the decisions of our own supreme court, some of which we have already noticed, as well as other authorities cited in the briefs, we feel constrained to hold that on the conceded facts the defendant can not be charged with the damages resulting to the boy plaintiff.

The judgment then will be reversed. All concur.

PRICE BAKING POWDER COMPANY, Appellant, v. CALUMET BAKING POWDER COMPANY, Respondent.

Kansas City Court of Appeals, December 4, 1899.

1. **Injunction:** DAMAGES ON BOND: FINAL DECREE. Damages arising from a temporary injunction can not be assessed until a liability has arisen on the bond, and this can not arise before a final decree, but a dismissal of the petition after the dissolution without a final hearing fixes the liability.

2. ———: ———: ———: WAIVER. Where the motion to assess damages is filed before the dismissal or final hearing and the plaintiff appears to the motion and without objection tries the damages and makes no complaint of prematureness, in his motion for a new trial, he waives the same.

3. ———: ———: INSUFFICIENT PETITION: WITNESS FEES. Where defendant secures the dissolution of an injunction because of the insufficiency of the petition, he is entitled to attorneys' fees as damages but not the fees and expenses of witnesses attending for the purpose only of securing the dissolution.

Appeal from the Macon Circuit Court.—*Hon. Andrew Ellison*, Judge.

AFFIRMED IN PART AND REVERSED IN PART.

M. D. Campbell for appellant.

(1) The damages allowed on the dismissal of a temporary injunction are only such as are the actual and proximate

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cause of the wrongful issuing. Holloway v. Holloway, 103 Mo. 274. There can be no recovery for improvident or imprudent expenditures. 10 Am. and Eng. Ency. of Law, p. 996 and cases cited. (2) In this case $253.03 of the recovery was expended by defendant in procuring the attendance of witnesses and *ex parte* affidavits to be used upon the hearing of the motion made in vacation to recall the temporary writ. These witnesses and affidavits were not used and could not have been used for the purpose for which they were procured and certainly not on the hearing of said motion. The only issue presented by the motion to recall was failure of the petition to state a cause of action. Upon the issue so joined evidence could not have been admitted. (3) The injunction suit was brought and temporary writ issued against Calumet Baking Powder Co. and some ten codefendants. The motion for assessment of damages is made by Calumet Baking Powder Co. only and no cause is shown for the non-joinder of the other defendants. A motion to assess damages must be joined in by all defendants or cause shown for such non-joinder or there can be no recovery. Ohnsorg v. Turner, 33 Mo. App. 488. We therefore insist this cause should he reversed.

Blevins, Lyon & Swarts and *Pam, Donnelly & Glennon* for respondent.

(1) The Macon county circuit court was, therefore, justified in assessing not only attorneys' fees, but also the traveling expenses of the officers of the respondent and the procuring of *ex parte* affidavits, and other losses, as damages to which the respondent was entitled. Bohan v. Casey, 5 Mo. App. 101; Skrainka v. Oertel, 14 Mo. App. 474; Railway v. Schneider, 30 Mo. App. 620, 624; Hammerslough v. B. L. and Sav. Ass'n, 79 Mo. 80, 87; Holloway v. Holloway, 103 Mo. 274; Trust Co. v. Stewart, 115 Mo. 236, 245. (2) The

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second point made by the appellant is, that the motion to assess damages is made by the Calumet Baking Powder Company only, notwithstanding the fact that there are several other defendants who were enjoined, and that no cause is shown for the non-joinder of the other defendants in the motion. In support of its position, the appellant cites the case of Ohnsorg v. Turner, 33 Mo. App. 488. It is hardly necessary to discuss this point, because the motion on its face shows that it is joined in by all the defendants; that the damage sustained by the defendants were the damages of the Calumet Baking Powder Company alone, and that therefore the damages should be assessed in favor of the Calumet Baking Powder Company, which was done. Jones v. Mastin, 60 Mo. App. 578.

ELLISON, J.—This case comes here on an appeal from judgment of assessment of damages arising from a temporary order of injunction issued by the trial judge in vacation and which was dissolved.

It appears that the judge in vacation granted a temporary writ on the execution of a sufficient statutory bond with sureties, at the same time allowing the party defendant to appear before him in chambers in ten days and move to dissolve the temporary order. The parties duly appeared and the judge recalled the order on the ground (as found to be stated in the motion) "that the petition does not state facts sufficient to constitute a cause of action, and that there is no equity in the petition and no cause for equitable relief is stated therein." Prior to the next succeeding term of the circuit court, in vacation, a motion was made to assess damages and the court, after a hearing in term time, allowed $250 as attorneys' fees and $253.03 as expenses of witnesses attending before the judge in vacation and the procuring of affidavits to present on the hearing of the motion to dissolve. . There was no final hearing of the original cause of action. But at the term of court suc-

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ceeding the filing of the petition and granting the temporary writ, plaintiff voluntarily dismissed the bill.

There can be no assessment of damages until a liability has arisen on the bond. For the assessment of damages is an incident to the bond. City of St. Louis v. Gas Light Co., 82 Mo. 349. And no liability can arise on the bond "before final decree in the case in which such bond was given." Cohn v. Lehman, 93 Mo. 574. In cases like the present on a final hearing the court may conclude that the view taken was erroneous and may find that the plaintiff was, at the time the writ was issued, entitled to the temporary injunction.

In Brown v. Mining Co., 32 Kan. 528, a temporary writ was granted and afterwards dissolved. Suit was then begun on the bond before a final hearing was had on the case. It was held that a suit could not be maintained "on an undertaking given on the issuing of a temporary injunction, until the final trial and judgment in the suit." And so the same was held, under like circumstances, in the case of Clark v. Clayton, 61 Cal. 634. It is true that by the terms of section 5500, Revised Statutes 1889, an assessment of damages may be had "upon the dissolution of an injunction in whole or in part." But that expression of the statute means a final dissolution, whether of the whole injunction granted or only a part thereof. And such must have been the view of the supreme court in Cohn v. Lehman, *supra*. The same remark will apply to section 5498, prescribing that the condition of an injunction bond shall be to pay all damages and costs "that shall be adjudged against him if the injunction shall be dissolved." That is to say, after a final hearing.

But, as before stated, plaintiffs at the term of court following the filing of the petition, voluntarily dismissed the same and this is regarded as a final adjudication against the right to an injunction. It is, so far as fixing liability on the bond is concerned, equivalent to a final hearing. 2 High on Injunctions, sec. 1649a.

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It might be said that since in this case defendant filed its motion for assessment of damages in vacation and before the dismissal of the bill, it was premature. However that may be it is enough that plaintiff answered the motion and tried the question of damages without objection on this head. The foregoing considerations answer plaintiff's contention that the motion was premature.

On the trial of the motion the bond was not introduced in evidence. Plaintiffs contend it should have been. It is, however, found set out in the record, put in the transcript by the clerk as a part of the record proper. The motion for new trial does not raise the question and it can not be considered. The question of the evidence failing to make or support a case for defendant is not set up in the motion. Fox v. Young, 22 Mo. App. 386; Putnam v. Railway, 22 Mo. App. 589.

We are, however, satisfied that the position taken by plaintiff as to the allowance of damages is well founded. The allowances were separated; stated to be for counsel fees, and for expenses of witnesses and depositions. The expense of counsel was necessary in the matter of obtaining a dissolution of the restraining order and as such was properly allowed. But when it is remembered that the question of dissolving or recalling the restraining order depended solely on the petition and was so considered at the hearing of the motion to dissolve and so adjudged by the trial judge, it becomes apparent there was no necessity for the expense of witnesses and depositions, and no damage in that respect should have been assessed. Ellwood Mfg. Co. v. Rankin, 70 Iowa, 403; Lawrence v. Trainer, 136 Ill. 474, and cases cited. The cases cited by defendant as being contrary are not considered in point.

We will, therefore, order the affirmance of the judgment as to the allowance of $250 counsel fees and reverse it as to the allowance of $253.03 for other expenses. Costs of this appeal to be taxed against defendant.

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HENRY ROWEN, Respondent, v. THE CHICAGO GREAT WESTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Railroads: KILLING STOCK: SUFFICIENCY OF PETITION: AIDER BY ANSWER. A complaint for killing plaintiff's stock through failure to fence is set out in the petition and held sufficient and that whatever defects, if any, it possessed were cured by the answer.**

2. **———: ———: FARM CROSSING: INSTRUCTIONS. It is error to submit to the jury the question whether or not a farm crossing is a necessity without a guiding instruction telling the jury what facts make such crossing a necessity.**

3. **———: ———: HANGING GATES: CAUSAL CONNECTION: INSTRUCTION. Though a gate in a railroad fence does not meet the requirements of the statute, yet there must be a causal connection between the defect and the injury to make the railroad liable, and an instruction set out in the opinion is held properly refused because it fails to call the attention of the jury to such connection.**

Appeal from the Worth Circuit Court.— *Hon. P. C. Stepp*, Judge.

REVERSED AND REMANDED.

Kelso, Schooler & Kelso for appellant.

(1) The court erred in overruling defendant's objections to the introduction of any evidence under the petition for the reason that it failed to state any cause of action and will not support the judgment. Morrow v. Railroad, 74 Mo. 82; Luckie v. Railroad, 67 Mo. 245; Johnson v. Railway, 76 Mo. 553; Cecil v. Railroad, 47 Mo. 246, 247; Cunningham v. Railroad, 70 Mo. 202; Gilbert v. Railroad, 23 Mo. App. 65; Seibert v. Railroad, 72 Mo. 566. (2) The court erred in giving in-

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struction number one for the plaintiff. Miller v. Railroad, 56 Mo. App. 72-78; Klamp v. Rodewalt, 19 Mo. 449. The issues can not be changed by instruction. Glass v. Gelvin, 80 Mo. 297-302. (3) The court erred in refusing to give instructions numbered 1, 2, 4 and 6, and each of them offered by the defendant. Harrington v. Railroad, 71 Mo. 384; Fitterling v. Railroad, 79 Mo. 504; Ridenore v. Railroad, 81 Mo. 227; Nicholson v. Railroad, 55 Mo. App. 593; Binicker v. Railroad, 83 Mo. 660.

Lingenfelter & Hudson for respondent.

(1) The petition is sufficient. It contains all the necessary allegations to state a cause of action under section 2611, Revised Statutes 1889, and has been repeatedly upheld by the courts of this state. Edwards v. Railroad, 74 Mo. 117; Perriquez v. Railroad, 78 Mo. 92; Campbell v. Railroad, 78 Mo. 639; Kronski v. Railroad, 77 Mo. 362; Bowen v. Railroad, 75 Mo. 426; Marrett v. Railroad, 84 Mo. 413. (2) The statute says that such gates must be hung and have latches or hooks so that they may be easily opened and shut. If it had been maintained in the condition required by law, "hung" so that it could be easily opened and shut, it is only fair to presume that anyone passing through it would have shut it, but by reason of its defective condition the labor and difficulty attended the opening and shutting were such that it was likely to be left open by persons having no interest in the premises. Morrison v. Railroad, 27 Mo. App. 418; Duncan v. Railroad, 91 Mo. 67; Kavanaugh v. Railroad, 75 Mo. App. 78. (3) The court did not err in refusing defendant's instructions numbered 1, 2, 4 and 6. This is unlike the case of Fitterling v. Railroad, 79 Mo. 504, cited by appellant. In that case whatever defect there was in the gate was not discovered until after the accident. Binicker v. Railroad, 83 Mo. 660. (4) The defect in this case was coexistent with its construction and no-

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tice was not required. McMillan v. Railway, 70 Mo. App. 568; Duncan v. Railway, 91 Mo. 67; Miller v. Railroad, 56 Mo. App. 72.

SMITH, P. J.—The statute (section 2611, Revised Statutes), provides that, "Every railroad corporation formed or to be formed in this state, * * * or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, * * *; and until openings, gates, etc., * * * as aforesaid shall be made and maintained such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, * * *."

It is alleged in the plaintiff's petition that the defendant, while running a locomotive and train of cars over its said railroad, and through, along and adjoining the inclosed and cultivated fields of plaintiff, struck and killed, of the property of the plaintiff, one black horse five years old, of the value of sixty-five dollars; one bay mare four years old, of the value of sixty-five dollars; one bay horse four years old, of the value of fifty dollars; one bay horse three years old, of the value of forty-five dollars; that said horses went upon said road where it passes through plaintiff's inclosed and cultivated fields where there was no public crossing and not within the limits of any incorporated town or city. Plaintiff further states that the defendant failed to erect and maintain lawful fences and gates along and adjoining the inclosed and cultivated fields of plaintiff, at the necessary farm crossings, and at the points where

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said animals came upon said road and were killed; and also failed to construct and maintain sufficient cattle guards at the public crossings near where said horses were killed, so as to prevent horses from getting on the track of said road, and that by reason of the willful and negligent acts of the defendant in not erecting and maintaining lawful fences, gates and cattle guards and by killing plaintiff's stock as aforesaid, the plaintiff is damaged in the sum of $225; that the defendant is liable under the laws of the state to pay the plaintiff double the amount of damages so done, to wit, in the sum of $450.

It is thus seen that it is in substance alleged that the injuries complained of were occasioned by reason of the failure of the defendant to erect and maintain lawful fences on the sides of its road where the same passes through the inclosed fields of the plaintiff. We think the petition is sufficient and that the demurrer thereto was properly overruled. Edwards v. Railway, 74 Mo. 117; Bowen v. Railway, 75 Mo. 426; Kronski v. Railway, 77 Mo. 362; Campbell v. Railway, 78 Mo. 639; Perriquez v. Railway, 78 Mo. 92; Marrett v. Railway, 84 Mo. 413. But if the plaintiff's petition were in anywise defective in its allegation of the facts necessary to constitute a cause of action under the statute just quoted, it is sufficiently aided by the allegations of the defendant's answer to support the judgment.

The defendant further objects that the first instruction given for plaintiff which submitted to the jury, without a further guiding instruction, the question, whether or not the farm crossing in question was necessary, was improper and should have been refused. It is now very well settled that in actions of this kind it is error to submit to the jury the question, whether or not the farm crossing is a necessity. Such a question is a mixed question of law and fact, and is not to be arbitrarily determined by the jury. Where a railroad company is bound by contract to maintain a crossing, or where a railroad divides a farm so as to preclude as convenient an access

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to the several parts thereof as would be furnished by a crossing, or where its railroad cuts in twain a way of necessity, or the easement of a private way existing anterior to its construction, the necessity mentioned in the statute arises, and if a crossing can be conveniently constructed the railroad company is under obligation to construct it. If the jury had been further told by a proper instruction that, if they found from the evidence that any of the conditions just referred to existed that then the farm crossing, where the gate through which the plaintiff's horses escaped, was a necessity. The error of the court in submitting the question of the necessity of the crossing to the jury without any proper guidance must be held fatal to the judgment. Miller v. Railway, 56 Mo. App. 72; Freet v. Railway, 63 Mo. App. 548; Kavanaugh v. Railway, 75 Mo. App. 78.

The defendant further objects that the court erred in refusing its fourth instruction which was to the effect that, even though the gate in question may not have been hung on hinges or fastened with a hook or latch, yet if when properly closed it was so constructed as to be a section or panel of the fence inclosing defendant's road, and that it was a lawful fence and equally as well calculated to keep stock off of the track as one hung with hinges and fastened with a hook or latch, your verdict must be for the defendant, unless you further find it was opened through the negligence of the defendant. The evidence discloses that defendant had a lawful fence along the sides of its road and a gate so constructed as to constitute a panel therein when closed. The gate was not hung on hinges or fastened with a latch or hook, but was a sliding one and could not be opened without first lifting up the end by which it could be fastened by inserting it between the two posts and then sliding it back on a slat nailed across a double post. It was clumsy and heavy, weighing about five hundred pounds. It was not so easy to open and shut as that required by the statute. The mere fact that the gate was not statutory can avail plaintiff nothing, unless there is shown some causal con-

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nection between it and the injury or, in other words, unless the defendant's failure in respect to providing the gate with a latch or hook, so that it could be easily opened or shut, was the proximate cause of the injury, there is no liability. Harrington v. Railway, 71 Mo. 384.

The defendant's said instruction would have been well enough had it gone further and told the jury, by way of qualification, that unless they found that the injury would not have happened but for the failure of the defendant to cause said gate to be hung and have a latch or hook, so that it could have been easily opened and shut, or unless they found that it would not have been either opened or left open but for such failure of the defendant. The instruction as given practically left out of consideration the conceded fact that the gate was not hung so as to be easily opened and shut, and was not provided with a latch or hook. The jury might have inferred that the gate would not have been opened, had it been provided with a latch or hook, or that if opened by a stranger that he would have shut it had it been hung so as to easily closed.

The court did not err in refusing the defendant's instruction in the nature of a demurrer to the evidence. There was some evidence, though by no means very strong or convincing, that the gate was opened by the plaintiff's horses. It was sufficient, under the practice prevailing in the appellate courts of this state, to entitle the plaintiff to a submission of the case to the jury.

Because of the erroneous action of the court in giving the plaintiff's first instruction the judgment must be reversed and cause remanded. All concur.

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GEORGE E. TURNER, Respondent, v. ANDREW BROWN, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Chattel Mortgages:** CONDITIONAL SALE: CONSTRUCTION: REPLEVIN. The law does not favor conditional sales and in doubtful cases the courts incline to favor mortgages. The instrument set out in the opinion is held to be a mortgage of indemnity and not a conditional or absolute sale, and upon condition broken plaintiff was entitled to possession of the property and to maintain replevin therefor.

2. ———: REDEMPTION: FORECLOSURE. Under the instrument in suit after condition broken, the mortgagor had the right of redemption until foreclosure by paying the money secured and the damages resulting from the broken condition; but on his failure to redeem, the mortgagee could hold the property subject to sale and indemnify himself out of the proceeds.

3. **Replevin:** RIGHTS OF THE PARTIES. All the rights of the parties could be adjusted in an action of replevin.

Appeal from the Worth Circuit Court.—*Hon. P. C. Stepp*, Judge.

REVERSED AND REMANDED.

W. H. Crawford and *A. M. Tibbels* for appellant.

(1) The court erred in overruling defendant's demurrer to plaintiff's evidence for the following reasons, viz.: Because if said contract is held to be a chattel mortgage, being one without any condition as to advertisement, sale, etc., it ought to have been foreclosed under the provisions of section 7090, Revised Statutes 1889. (2) The court erred in refusing instruction number 4, asked by defendant

Sanders & Lingenfelter for respondent.

(1) The court did not err in overruling defendant's demurrer to plaintiff's evidence. There was certainly sufficient

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evidence to entitle the case to go to the jury. Taylor v. Short, 38 Mo. App. 21; Baum v. Fryrear, 85 Mo. 151; Rippey v. Friede, 26 Mo. 523; Eswin v. Railway, 96 Mo. 290; Price v. Barnard, 65 Mo. App. 649; Jennings v. Railway, 112 Mo. 268. (2) We insist that even though the court should hold that said contract is a chattel mortgage, the appellant's position is not well taken, and the court properly overruled the demurrer. The evidence is conclusive that defendant refused and failed to comply with the conditions of his contract. After condition broken, the legal title to the property mortgaged is in the mortgagee and he may maintain replevin for the property covered by the mortgage. Lacy v. Giboney, 36 Mo. 320; Johnson v. Houston, 47 Mo. 227; Willison v. Smith, 52 Mo. App. 133. (3) The court committed no error in refusing instruction number 4 asked by appellant. Gregory v. Tavenner, 38 Mo. App. 627; Cook v. Clary, 48 Mo. App. 166; Trimble v. Mercantile Co., 56 Mo. App. 683; Beatie v. Coal Co., 56 Mo. App. 221.

SMITH, P. J.—This is an action of replevin which was brought before a justice of the peace to recover three horses. The plaintiff had judgment in the circuit court and defendant appealed.

The facts which the evidence tends to establish are these: One Brandt was awarded by the United States a contract for carrying the mail between Grant City and Sheridan, in this state, at seventy-five dollars a quarter. Brandt afterwards sublet this contract to plaintiff, and also sold him the spring wagon hereinafter referred to. Plaintiff and defendant entered into a written contract by which it appears that in consideration of seventy-five dollars plaintiff sold defendant said spring wagon and the said mail route, one-half of said purchase price to be paid whenever payment should be made for carrying the mail on said route for the first quarter and the second instalment when payment should be made on the second quar-

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ter. This contract contained other provisions to the effect that, in consideration of the payment to defendant by plaintiff of one dollar, and for other valuable considerations, the former sold to the latter the horses described in the complaint, the title thereto to vest in plaintiff but the possession to remain in defendant until the condition of the contract should be broken. These further provisions were contained in the contract:

"It is further agreed by the said Brown that he shall faithfully and punctually carry the mail according to the government schedule to and from the points named above, and that he will at all times deport himself in accordance with the postal regulations so that the said Turner, nor his grantors nor bondsmen shall be in anywise liable to the government therefor.

"It is further agreed that in the event the said Brown shall fail to carry out and perform all the duties of mail carrier as aforesaid, then and in that event the said Turner is hereby empowered to enter the premises wherein said property may be found and take possession of the same, but the title and possession of said property as aforesaid shall by these presents then become fully vested in the said Turner as aforesaid.

"In case the said Brown shall comply with all the stipulations of the foregoing contract, then and in that event, these presents, so far as they relate to the title to the aforementioned hack, harness and horses, shall be void and the title thereto shall vest and remain in the said Brown."

The defendant, in pursuance of said contract, carried the mail on said route from July 18 to September 9, when he abandoned it. The plaintiff was in consequence thereof compelled to resume carrying it himself. The defendant declining to deliver said property, as he had bound himself under said contract to do, this suit was instituted.

The instrument effected a present transfer of the title to the property specified therein to the plaintiff, subject to be defeated by the noncompliance by the defendant with all tho

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provisions thereof. These provisions made it a mortgage, valid and binding as between the parties thereto. The defendant made default in the performance of the conditions thereof and by the terms and provisions thereof the right of possession passed to plaintiff; so that the legal title became vested in plaintiff, subject to defendant's mere equity of redemption. We can not think the transaction was a conditional sale. Of course it is often quite difficult to distinguish such a sale from a mortgage. The law does not favor conditional sales and in doubtful cases the courts incline to favor mortgages. If it appears that a given transaction was intended by the parties to be a mortgage it will not be suffered to be converted into an absolute or conditional sale by any mere form of words. A mortgage is generally a security for a debt, or an indemnity to save the mortgagee, harmless against a contingent liability or loss that may be in some way incurred by him. While a conditional sale is usually a purchase for a price paid, or to be paid, to become absolute in a particular event. In the present case it does not appear that the plaintiff paid or was to pay defendant anything for the property.

We can not lend countenance to the idea that it was the intention of the parties that in the event the defendant made default in the performance of the conditions of the contract that the plaintiff's title should thereby become absolute, and that the defendant should, in that event, have no equity of redemption. It seems clear to us that the transaction was a mortgage of indemnity. The inference to be deduced from the language of the instrument and the circumstances surrounding its execution, as disclosed by the evidence, is that it was the intention that the plaintiff should be thereby afforded indemnity for any loss or damage to which he might be subjected by reason of the defendant's default in performing the conditions of the contract. It might well have been that in consequence of such default the plaintiff was subjected to considerable loss and damage. It may have been that the mail

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could not be carried on said route for the compensation allowed under the contract; that losses in other ways may have directly resulted to the plaintiff on account of the defendant's default, against all of which the plaintiff was protected by the indemnity afforded by mortgage.

It seems to us that the said mortgage was to stand as a security for the payment of the seventy-five dollars, the purchase price of the spring wagon. If each of the two deferred instalments were not paid at the times therein stipulated, this was also a breach of the conditions of the mortgage which authorized the plaintiff to take possession of the mortgaged property. It was competent for the defendant to show that this debt was paid before this suit was begun, and that the plaintiff was not entitled to possession for that reason. If the defendant failed to pay, or caused to be paid all of said seventy-five dollars, or any part thereof, at the stipulated times, or failed to perform the conditions of the contract in respect to carrying the mail, the plaintiff, in consequence of one or both of such defaults, became entitled to the possession of the property. He had a right to hold and subject it to sale, and out of the proceeds to discharge said debt, if not paid, and to make himself whole for any direct loss sustained by reason of the defendant's default in respect to the mail contract. Until the defendant's equity of redemption is properly foreclosed he may redeem by the payment of the said debt, or the part remaining unpaid, if any, and the amount of the actual loss or damage sustained by plaintiff growing out of the defendant's default in carrying the mail.

It appears from the evidence that before this suit was commenced the defendant re-delivered the spring wagon to the plaintiff, but whether it was received in discharge of the purchase price due plaintiff, or how, is not disclosed. If it was taken back in discharge of the debt, then that operated as a satisfaction of the mortgage as to the seventy-five dollar debt.

If Brandt retained for plaintiff any part of the money

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that he received from the United States that was due the defendant for carrying the mail and applied it on the debt of plaintiff to him, Brandt, then it would seem that if this amount was equal to the actual loss or damage sustained by plaintiff on account of the defendant's failure to perform the contract in respect to carrying the mail, then the plaintiff could have no interest in said property or right to the possession thereof. All the rights of the parties can be adjusted in this action. Gregory v. Tavenner, 38 Mo. App. 627; Dilworth v. McKelvy, 30 Mo. 149; Boutell v. Warne, 62 Mo. 350. The interest of the plaintiff in the mortgaged property was only special until foreclosure. His title was not absolute and unconditional. The court should have, by its instructions, directed the jury to find the value of the plaintiff's special interest in the property, and then given judgment accordingly. R. S. 6185.

It follows from this that the defendant's fourth instruction, which was refused, should have been given.

The judgment will be reversed and cause remanded. All concur.

BURNHAM, MUNGER & CO., Appellants, v. WILLIAM F. SMITH et al., Appellants.

Kansas City Court of Appeals, December 4, 1899.

1. **Creditor's Bill:** JUDGMENT CREDITOR: GENERAL CREDITOR. A court of equity is not ordinarily the forum for litigating disputed claims, and a creditor must reduce his claim to a judgment before appeal to a court of equity to enforce its collection.

2. ———: ———: ———. But where the debtors are insolvent and their only property consists of an equity of redemption of certain chattels in the hands of a mortgagee which can not be reached by attachment, execution or garnishment, and the creditor's claim is in effect undisputed, a court of equity will entertain a creditor's bill to subject the surplus in the mortgagee's hands to the payment of a debt on equitable principles.

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3. **Lis Pendens:** PERSONALTY. The doctrine of *lis pendens* applies to personalty except negotiable paper and ordinary articles of commerce.

4. ——: BASIS OF DOCTRINE: COMMON LAW: COMMENCEMENT. In some cases the doctrine of *lis pendens* is based upon the theory of notice, but it eally rests upon public policy, preventing the alienation of the property to the prejudice of the parties pending the litigation, and the common law gives effect to the doctrine from the service of the subpoena.

5. **Creditor's Bill:** LIS PENDENS: LIEN. The filing of a creditor's bill creates no lien on the debtor's equitable assets by reason of the *lis pendens*.

6. **Lis Pendens:** EFFECT OF THE DOCTRINE: PUBLIC POLICY: PARTY. The sole object of *lis pendens* is to keep the subject of controversy within the power of the court until the decree is entered so as to give effect to the decree and bind an alienee though not a party.

7. **Creditor's Bill:** LIS PENDENS: MORTGAGE: GENERAL CREDITORS: MARSHALING ASSETS. A mortgage delivered after service of subpoena in a creditor's bill is ineffective to change the grantor's interest in the property which is the subject of the suit; and the grantees in such mortgage are no more than general creditors and on a marshaling of the assets take *pari passu* with the other general creditors.

8. **Sales:** FRAUD: AFFIRMING CONTRACT: WAIVER: DEBTOR AND CREDITOR. Though a sale be voidable by reason of the fraud of the vendee, the vendor by affirming the contract and taking security for the purchase money waives all his rights growing out of the fraud and becomes a simple contract creditor.

Appeal from the Nodaway Circuit Court.—*Hon. C. A. Anthony,* Judge.

AFFIRMED.

Ira K. Alderman and *Ben J. Phillip* for appellants.

(1) It appears upon the face of the petition that the plaintiffs (assuming that they have any claim) are simple contract creditors of Saunders & Butcher. They must under the general rule reduce their claim to judgment before they can

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seek relief in a court of equity. Crim v. Walker, 79 Mo. 335; Turner v. Adams, 46 Mo. 95; Martin v. Michael, 23 Mo. 50. "The object is, in the first place, by judgment, to reduce the creditor's claim to a certainty—to show that he is in fact a creditor, unless the party shows that he has no concern with his debtor's supposed frauds." Merry v. Fremon, 44 Mo. 518-520; Mullen v. Hewitt, 103 Mo. 639, 650; Thias v. Siener, 103 Mo. 314, 323; Spitz v. Kerfoot, 42 Mo. App. 77; Wait, Fraud. Con. and Cred. Bills, sec. 73 and cases cited; Poulsen v. Van Steenbergh, 65 How. Pr. (N. Y.) 342. (2) Courts of equity are not tribunals for the collection of ordinary demands. Webster v. Clark, 25 Me. 314. (3) To the general rule above stated there is, upon principle, four exceptions: (a) A judgment may be dispensed with from necessity, where it is impossible to obtain one on account of the absence or non-residence of the debtor. Webb v. Lumber Co., 68 Mo. App. 546; Pendleton v. Perkins, 49 Mo. 565; Bank v. Paine, 13 R. I. 592. (b) Where the debtor is dead, for the assets of the estate are trust funds. Grosvenor v. Austin, 6 Ohio 112; Nieters v. Brockman, 11 Mo. App. 600; Martin v. Wagenor, 33 S. C. 487. (c) Where the fund to be reached is a trust fund for the benefit of all creditors, as the assets of an insolvent corporation or limited partnership. White v. Land Co., 49 Mo. App. 450; Batchelder v. Altheimer, 10 Mo. App. 181. (d) Where the creditor seeks to enforce a lien which he holds. (4) The case at bar does not fall within any of these exceptions. There is one case decided by the St. Louis Court of Appeals which apparently sustains the ruling of the lower court on this point. Luthy v. Woods, 1 Mo. App. 167. That case is not sustained upon principle or authority and has been repudiated in later cases. Hayden, J., in an able opinion, has demonstrated the fallacy of that opinion so that no further argument is required. Kent v. Curtis, 4 Mo. App. 121; Luthy v. Woods, 6 Mo. App. 67; Wait on Fraud. Conv. and Cred. Bills [3 Ed.], sec. 73, p.

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145. (5) The fund in controversy being equitable assets, whatever may be the law in other states it has been recently settled here that the filing of a creditors' bill and the service of process does not create a lien thereon. "The moving creditor gets no lien by the mere filing of his bill, and for the naked reason that the assets are equitable assets and that it is the act of the court and not the act of the creditor that creates the lien. The lien is created by the decree, and not by the bringing. of the suit." St. Louis v. Lumber Co., 114 Mo. 74; Rieper v. Rieper, 79 Mo. 352. If the bringing of the suit created no lien, Saunders & Butcher had the right to mortgage the property to secure appellants' debts, and their mortgage having once attached could not be affected by any lien subsequently created. While it is true the rule is that equitable assets are to be distributed *pari passu* among all the creditors before the court yet it must be remembered that the rule means all creditors similarly situated, or in the same class.

Karnes, New & Krauthoff, E. A. Vinsonhaler and *A. F. Smith* for respondents.

(1) A court of equity has jurisdiction in this case. It is admitted that if plaintiffs had reduced their claim to judgment, their action would be maintainable; but it is contended by the defendants' creditors that inasmuch as their claim is not in judgment, they have no standing in this court. This contention is unsound. It is not an invariable rule that a creditors' bill will only lie on an adjudicated claim. Luthy v. Woods, 1 Mo. App. 167; Savings Ass'n v. Kellogg, 52 Mo. 583. The mere bringing of a suit under such a state of facts would have been idle, vain and fruitless. Trustees v. Nicholl, 3 Johns. 566, 598; Dodd v. Levy, 10 Mo. App. 121, 123, 124; Furlong v. Thomssen, 19 Mo. App. 364, 367, without comment; Kein v. School District, 42 Mo. App. 460, 462; White v. Land Co., 49 Mo. App. 450, 466; Fahy v. Gordon, 133 Mo.

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414, 427; Humphreys v. Milling Co., 98 Mo. 542, 551; Edwards v. Rosenheim, 74 Mo. App. 621, 625; Guerney v. Moore, 131 Mo. 650, 666; Carp v. Chipley, 73 Mo. App. 22, 32, 33. (2) It is immaterial to the plaintiffs whether they procure a lien by the filing of their bill or whether they procure a lien when the court renders a final decree. If they have a right to bring their action—if the court of equity acquires jurisdiction—then the property is in the control of the court, and the plaintiffs are content to let it remain there until the court makes such disposition thereof as equity demands. (3) For the reasons above stated, we believe the court has jurisdiction in this case. If the court has jurisdiction, then the plaintiffs are entitled to the whole of the fund in the hands of Smith, trustee, first, because it is their property which made the fund; and second, because the defendant creditors have elected to contest the plaintiffs' right of action, and they can not share in the proceeds. They have selected their own course of procedure. They have put all possible obstacles in the way of the plaintiffs' recovery, and they are estopped to claim the fruits of the plaintiffs' labors. Valentine v. Decker, 43 Mo. 583; Glass Co. v. Baldwin, 27 Mo. App. 44, 52; Stoller v. Coates, 88 Mo. 514, 521; Fox v. Windes, 127 Mo. 502, 511, 512.

SMITH, P. J.—This is a suit in equity, the material facts of which may be grouped in about this way: The plaintiffs were an incorporated company of wholesale merchants and the defendants, Saunders & Butcher were retailers who were, at the date of the commencement of this suit, indebted to plaintiffs in the sum of $1,374.43 for goods sold and delivered by them to the defendants; that on June 1, 1898, the said Saunders & Butcher executed a deed of trust to the defendant Smith as trustee upon their stock of goods, fixtures, etc., to secure a debt due the Maryville National Bank for $1,600, in which it was conditioned that if the said debt was not paid at

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7 o'clock a. m. June 2, 1898, the said trustee should have power to sell; that the said deed of trust was duly recorded and the trustee took possession thereunder; that the value of the said stock of goods exceeded the amount of said bank debt by upwards of one thousand dollars; that the said Saunders & Butcher were also indebted to the defendant, Hundley-Frazer Dry Goods Company—a mercantile corporation—in the sum of $437.34 and to defendant August in the sum of $1,838.34 for goods sold and delivered by the latter to the former.

The petition in this case was filed and the process issued thereon was served on the defendants on the third day of June, 1898; that on the last named day and year the said Saunders & Butcher executed to said Smith, as trustee, a second deed of trust on said stock of goods to secure the debts of the defendant Hundley-Frazer Dry Goods Company and August, but which was not delivered until after the filing of the plaintiffs' petition and the service of the process issued thereon. It is true that the evidence was conflicting as to this last stated fact but the trial court found it to be as we have stated and we shall defer to that finding; that Saunders & Butcher were wholly insolvent and had no property, nor any interest in any, other than that covered by said deeds of trust.

The petition is in the nature of a creditors bill in which all of the parties mentioned in said deeds of trust were made parties defendant. The prayer was for an accounting by Smith, as trustee, etc. etc., for such other relief as in equity and good conscience to the court should seem meet. The court by its decree declared that the only property available for the payment of the plaintiffs' debt was the surplus in the hands of the trustee under the bank's deed of trust, amounting to $1097.80 which was declared equitable assets and ordered to be disturbed *pro rata* among all the creditors hereinbefore named except the bank. From this decree both plaintiffs and defendants appealed.

The defendants in the court below unsuccessfully demurred to the plaintiffs' petition on the ground that it did not

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state facts sufficient to constitute a cause of action, in that it appeared from the allegations thereof that the plaintiffs were simple contract creditors of Saunders & Butcher. The question thus raised by defendants is again urged here. It is conceded that the plaintiffs had not reduced their claim to judgment. The general rule is that this must be done before a claimant can successfully invoke the interposition of a court of equity. A court of equity is not ordinarily the forum for litigating disputed claims. Crim v. Walker, 79 Mo. 335; Turner v. Adams, 46 Mo. 95; Martin v. Michael, 23 Mo. 50; Humphreys v. Milling Co., 98 Mo. 542; Mullen v. Hewitt, 103 Mo. 639; Edwards v. Rosenheim, 74 Mo. App. 621. The object is, in the first place, to reduce by judgment the creditor's claim to a certainty, and to show that he is in fact creditor. Merry v. Fremon et al., 44 Mo. 518; Thias v. Siener, 103 Mo. 314; Poulsen v. Van Steenbergh, 65 How. Pr. (N. Y.) 342.

But to the requirement of this rule there are a number of well recognized exceptions, one of which is where a party not subject to garnishment is indebted to an insolvent person, a court of equity will aid a creditor of such insolvent in appropriating this credit to the satisfaction of his demand, even though he had not reduced his claim in the first instance to a judgment in a court of law. Pendleton v. Perkins, 49 Mo. 565, was where the facts were substantially as here, except that the defendants were non-residents and no means existed for getting a judgment against them. In that case the court say: "It seems thus to be satisfactorily settled upon authority that when a debtor has absconded so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, a creditors' bill will lie in the first instance, and from the necessities of the case. It is analagous to a proceeding to subject the equities of a deceased debtor, or to satisfy a debt from a specific equitable fund, as to enforce a lien, in neither of which cases is a personal judgment required, citing O'Brien v. Coulter, 2 Blackf.

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421; Russell v. Clark's Heirs, 7 Cranch, 89." But here the debtors were residents and a judgment could have been had against them. Will this difference in the facts prevent the application to this case of the principles just stated?

Luthy v. Woods, 1 Mo. App. 167, is a case in which the essential facts were similar to these here, and where it was said: "It can not be said that the plaintiff has exhausted his legal remedies against Woods & Barnes (the debtors). Clearly he has done nothing of the kind. But he declares that it would be vain and useless to attempt to put in use against them any legal process; that they are completely proof against everything of this nature and that a resort to the equitable jurisdiction of the court is all from which he can hope for relief. Will the court, nevertheless, compel him to go through an empty form? Or is it an empty form? If it is an empty form the court will not compel him to comply with it. *Lex neminem cogit ad vana seu inutilia*—the law compelleth no man to do a vain or useless thing. This maxim of the common law and of common sense was lately approved by the decision of the supreme court in Savings Ass'n v. Kellogg, 52 Mo. 583. Says Chief Justice Kent, in Trustees, etc., v. Nicoll, 3 Johns. 566: 'It is one of the maxims of the common law which is also a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous. * * *' Nothing need be said in illustration of a principle so clearly vindicated. If the bringing of a suit and the obtaining of a judgment against the debtor were indeed an empty form, the law will not exact compliance with it." See Guerney v. Moore, 131 Mo. 650.

The defendants insist that while Luthy v. Woods, *supra*, has not been expressly overruled that it has been in effect overthrown by other and later adjudications. The case was again before the court in 1878 when the principles announced when it was there in the first instance were reaffirmed. 6 Mo. App. 67. In Dodd v. Levy, 10 Mo. App. 123, it was said: "The

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case of Luthy v. Woods was like the preceding (Pendleton v. Perkins, *supra*), except that the debtors were residents of the state and a personal judgment could have been had against them without difficulty. But the fund, against which the creditor proceeded without first establishing his demand by judgment, was in the hands of the St. Louis School Board, so that, by force of statute, it was not subject to garnishment either under attachment or execution. There is a vital distinction between that case and the case at bar. There the creditor could not impound the fund by attachment, and unless he had been permitted to bring his bill in equity in the first instance he might have lost his remedy altogether. But in the present case, the debtor, though a non-resident, has tangible property in this state which can not run away."

In Kein v. School Dist. 42 Mo. App. loc. cit. 462, it was said: "Luthy v. Woods, 1 Mo. App. 167, was where the board of directors of the St. Louis Public Schools were indebted to Woods & Barnes, who were insolvent and indebted to the plaintiff, and it was held that an action in equity against the school board to satisfy the plaintiff's debt out of the amount it owed Woods & Barnes, could be sustained on the ground that Woods & Barnes were insolvent, and the school board was not subject to garnishment. The case is again reported in 6 Mo. App. 67, when it was finally disposed of without any departure from the ruling made when it was first decided." In White v. University, 49 Mo. App. 450, it was said: "There is no doubt as to the general proposition that, where a creditor seeks to set aside the alleged fraudulent conveyance of his debtor, he must come into a court of equity with an adjudicated demand. He has no right to question the act of his alleged debtor, unless he is shown to be a genuine *bona fide* creditor; and, as a general rule, it is held that this must first be established by the judgment of a court of law. But this rule even has many exceptions. While admitting it to be necessary that a party shall first exhaust every legal remedy before

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resorting to the court of equity, yet the courts have, in a great variety of cases, permitted the creditor to apply in the first instance to the court of chancery, as, for example, where it appears manifest that a suit at law would be wholly unavailing, citing Luthy v. Woods, 1 Mo. App. 168." It is thus seen that Luthy v. Woods, has been several times approved and followed by both decisions of the court of appeals.

We have examined most of the cases cited in the brief of counsel for the defendant which are supposed to be contrary to Luthy v. Woods, but these, we find, no more than announce the well established rule that before a creditor can have the aid of a court of equity he must exhaust his remedies at law, or, in a case of this kind, he must first reduce his claim to a judgment. But to this general rule these cases declare there are a number of exceptions: Such, for example, as when it is impossible to obtain a judgment on account of absence or non-residence of the debtor; or where there is no dispute as to the debt, and the debtor died notoriously insolvent; or where the fund to be reached is a trust fund for the benefit of all creditors, as the assets of an insolvent corporation or limited partnership; or where it is sought by a creditor to enforce a lien, and the like; but none of these cases hold that these are the only exceptions to the rule. We discover nothing in any of the cases to which we have been referred that either expressly or impliedly overrule Luthy v. Woods.

The goods were in the possession of the trustee after condition broken. The debtors still had their equity of redemption therein until foreclosure was completed. They were entitled to the surplus after the payment of the bank debt. The debtors' equity of redemption could not be reached by attachment, execution or garnishment; or, in other words, it was not subject to be impounded by legal process as against the rights of the trustee to possession. Fahy v. Gordon, 133 Mo. loc. cit. 427; Yeldell v. Stemmons, 15 Mo. 443; Boyce v. Smith, 16 Mo. 317. The case presented by the petition

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is one where the debtors are insolvent and have no property interests except the equity of redemption in a stock of goods in the possession of the mortgagee, after conditions broken, so that the same can not be touched by legal process. The debtors' interest in the goods can no more be reached by legal process than could a debt due him by a public school district, a municipal or other public corporation or the interest of a deceased insolvent debtor in property fraudulently conveyed or covered up with a pretensive trust. And a suit at law against the debtors, though service of process could be had on one of them, would be vain, since they were insolvent—law proof.

There may be cases where the debt is disputed and where there are issues of fact in respect thereto which the debtor is entitled to have submitted to a jury, and a court of equity would refuse, in that event, to further entertain jurisdiction of the cause but nothing of this kind appears upon the record here. What sense would there have been in requiring the plaintiff to reduce his claim to judgment before allowing it to invoke the aid of a court of equity to enable it to reach the debtors' equity in the mortgaged goods? After the delay and cost incident to the procurement of the judgment the plaintiff would have been in no better situation and the debtors in no worse than they were had no suit been begun. Why resort to a court of law to merge the debt into a judgment when it was already undisputed? Why require the plaintiff to do a vain and useless thing before the door of a court of equity would be open to him? The only effect of requiring the plaintiff to reduce his claim to judgment would have been to give the debtors an opportunity to fraudulently dispose of their equity of redemption, or to give a preference to other creditors whose debts were no more entitled to be paid than that of plaintiffs. A court of equity, which always delights in equality in such case would hardly refuse to entertain jurisdiction of a creditors' bill because the plaintiffs had not reduced their

claim to judgment. It seems to us that the trial court in overruling the defendants' demurrer and allowing the cause to proceed acted in accordance with the principles of an enlightened and progressive equity jurisprudence, with which, therefore, we can find no fault.

But the defendants complain of the action of the court in distributing the assets of the debtors *pari passu* among plaintiffs, the defendants—Hundley-Frazer Dry Goods Co.—and August, the only general creditors, because they say that they are entitled to the whole of the surplus under their second deed of trust. As previously stated, the plaintiffs' petition and the process issued thereon was served on the trustee and the other defendants prior to the delivery and recording of such deed of trust. This was, in effect, a *lis pendens* as to the defendants. It is now well settled that the doctrine of *lis pendens* applies to personalty except negotiable paper and ordinary articles of commerce. Carr v. Coal Co., 15 Mo. App. 551, and authorities there referred to.

The doctrine is an equitable one, but in law the same effect is produced by the rule that the purchaser takes only the title of the vendor. Every man is supposed to be attentive to what passes in the superior courts of the sovereignty where he resides, and some courts have based the doctrine upon the theory of notice. But it would seem that the doctrine really rests upon public policy which does not allow litigating parties to give others, pending the litigation, rights to the property so as to prejudice the opposite party. Carr v. Coal Co., *supra*; Newman v. Chapman, 2 Rand. 93; Bellamy v. Sabine, 1 De. G. & J. 566. The common law authorities are uniform to the effect that in suits in chancery *lis pendens* commences at least after the subpoena is served. Herrington v. Herrington, 27 Mo. 560; Fenwick v. Gill, 38 Mo. 510; Metcalf v. Smith, 40 Mo. 572; Bennett on *Lis Pendens*, secs, 72, 73; Bensley v. Water Co., 13 Cal. 306; Corwin v. Bensley, 43 Cal. 263; Burroughs v. Reiger, 12 How. Pr. 170.

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The defendants insist that the plaintiffs acquired no lien on the debtors' equitable assets by reason of the *lis pendens*, or, in other words, that the filing of the plaintiffs' creditors' bill created no lien in their favor; and this seems to be so under the ruling of the supreme court in Rieper v. Rieper, 79 Mo. 352, and in St. Louis v. Lumber Co., 114 Mo. 74. If the filing of the plaintiffs' petition and the service of process issued thereon did not create a lien in favor of the plaintiffs then what effect did it have, if any, on the rights and power of the parties in respect to the assets in dispute? The principle of the rule *lis pendens* is of common law origin. The rule itself was first formulated by Lord Chancellor Bacon. It was adopted for the better and more regular administration of parties in chancery. It provided: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited and is made no party, neither by bill, nor the order; but, where he comes in *pendente lite*, and, while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but, if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice." Bennett's *Lis Pendens*, sec. 1. It is stated in section 9 of the work of the author just cited that the better opinion is that the rule is derived from Roman law, in which it was provided: "A thing concerning which there is a controversy is prohibited, during the suit, from being alienated. '*Rem de qua controversia prohibemur in acrum dedicare.*'"

The underlying principle upon which *lis pendens* rests is, that during the pendency of the suit an alienee may be bound by the proceedings therein subject to the alienation, and that such purchaser may be bound by the judgment or decree in the suit without being made a party. The common law maxim is: *Pendente lite nihil innovitur.* 2 Bouv. Law Dict. 120. The sole object of *lis pendens* is to keep the subject in controversy

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within the power of the court until the decree is entered, and thus make it possible to give effect to the decrees of courts of justice. Coke Lit. 344b.

In Newman v. Chapman, 2 Rand. 93, it is said: "The rule as to effect of *lis pendens* is founded upon the necessity of such rule, to give effect to the proceedings of courts of justice. Without it, the administration of justice might in all cases be frustrated by successive alienations of the property which was the object of the litigation pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object." To the same effect is Murray v. Ballou, 1 Johns. Ch. R. 576. In *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. The necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigants but also on those who derive title under them by alienation made pending the suit whether such alienee had not notice of the proceedings. Bellamy v. Sabine, 1 De. G. & J. 566. In Carr v. Coal Co., *supra*, the case of Newman v. Chapman, *supra*, is approvingly quoted to the effect: "The publicity of judicial proceedings is the same in either case and the danger of defeating the decrees of a court by transfer of that to which they relate is much greater in the case of movable property than in that of real estate. So that, for the protection of litigants it would seem a still more rigid rule should be promulgated to prevent the disposal of personalty than of realty *pendente lite.*" Although often referred to, as a lien, *lis pendens* is strictly not a lien. It is simply the power or force of the jurisdiction of the court. It is of itself simply the power of the court, taking effect upon the subject-matter of the litigation so as to preserve the *status quo*—hold it within the grasp of the court for the execution of the final decree or judgment. Bennett on *Lis Pendens*, section 126.

It would therefore seem from these considerations that as

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the second deed of trust was executed *pendente lite*, that it was not in the power of the debtors to change or alter by alienation their interest in the equity of redemption in the property which was the object of the suit. That equity was in no wise affected by the conveyance. The status of the debtors' interest at the time of the decree was not different from that which it was at the time of the filing of the petition and the service of process issued thereon.

The defendants, but for the said second deed of trust, do not pretend to be more than general creditors and since that instrument was ineffectual it must necessarily follow that they were no more than general creditors along with plaintiff and as such were entitled to have the assets in controversy distributed *pari passu* among them all. 1 Story's Eq. 544; Rieper v. Rieper, 79 Mo. 360.

But the plaintiffs claim that inasmuch as the goods for which the debtors are indebted to them were procured from them by fraud, and under such circumstances as entitled them to reclaim the same in the hands of the debtor, that therefore their right to the fund is superior in equity to that of the defendant creditors. The plaintiffs elected to affirm the contract of sale so made and to proceed on the contract as if there was an absence of fraud. They waived whatever rights they had growing out of the fraud and voluntarily placed themselves in the same attitude as the other simple contract creditors. We do not perceive that the doctrine announced in Valentine v. Decker, 43 Mo. 583, and the other cases cited by the plaintiff to the same effect, is invocable in a case like this. Plaintiffs and defendants each claim a priority or preference entitling them to the whole of the assets remaining in the hands of the trustee. The trial court declined, and as we think rightly, to recognize the claim of either, but found they were all general creditors and, under the facts disclosed by the evidence, entitled to share ratably in the distribution of the

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assets affected by the suit, and this, it seems to us, was highly equitable.

The other points, to which our attention has been called in the brief of counsel, and not hereinbefore alluded to, have been considered and found without merit.

The decree of the circuit court will accordingly be affirmed. All concur.

TONY MOTCH, Respondent, v. CHICAGO GREAT WESTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Railroads: KILLING STOCK: CATTLE GUARDS: FENCE: INSTRUCTIONS. Where the animal killed gets on the right of way over cattle guards, evidence and instructions for the plaintiff relating to the condition of the fence are confusing, although defendant's instruction informs the jury there was no evidence of an entrance through the fence, since such instruction adds to the confusion, as also does one given in this case that it was not necessary for plaintiff to show the exact place where the animal entered.

Appeal from the Nodaway Circuit Court.—*Hon. C. A. Anthony,* Judge.

REVERSED AND REMANDED.

Ramsay & Blagg for appellant.

Appellant claims the court should have sustained the demurrer offered at close of plaintiff's evidence because there was not a "scintilla of evidence offered by plaintiff which tended to show that these cattle guards and particularly the north 'positive' cattle guard, was in any manner defectively erected or maintained," and because the trial court "finding as it did, that plaintiff's horses passed in over this 'positive' cattle guard." This is a question for the jury to determine from all the facts and circumstances in the case. 3 Wood on Railways,

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sec. 1557; Jones v. Railway, 59 Mo. App. 137; Cole v. Railway, 47 Mo. App. 624; Railway v. Ritz, 34 Kan. 404; 19 Am. and Eng. R. R. Cases, 611. The petition contained all the material and necessary allegations. Jones v. Railway, 65 Mo. App. 443; Woods v. Railway, 51 Mo. App. 501; Jones v. Railway, 44 Mo. App. 15; Vail v. Railway, 28 Mo. App. 372; Meyers v. Union Trust Co., 82 Mo. 240; Duncan v. Railway, 91 Mo. 70; Mayfield v. Railway, 91 Mo. 296; R. S. 1889, sec. 2611; Fraysher v. Railway, 66 Mo. App. 573; Manz v. Railway, 87 Mo. App. 278; Kauffman v. Railway, 67 Mo. App. 159. (2) Appellant's second claim is untenable. Railway v. Ritz, 34 Kan. 404; 19 Am. and Eng. R. R. Cases, 611; 3 Wood on Railways, 1557; Jones v. Railway, 59 Mo. App. 137; Cole v. Railway, 47 Mo. App. 624. (3) The third error complained of by appellant is equally untenable. Blanton v. Dold, 109 Mo. 77. The instruction considered as a whole, fairly states the law, and appellant has not been injured thereby. Fields v. Railway, Mo. App.; Reporter, p. 746, and cases cited; Wetzell v. Wagoner, 41 Mo. App. 509; Wallich v. Morgan, 39 Mo. App. 469; Railroad v. Vivian, 33 Mo. App. 583; Reilly v. Railroad, 94 Mo. 600.

J. W. Tompson for respondent.

(1) The trial court, finding as it did that plaintiff's horses passed in over this "positive" cattle guard, should have sustained defendant's demurrer to the testimony. Walton v. Railway, 32 Mo. App. 634; Rottman v. Pohlmann, 28 Mo. App. 399; Donohue v. Railroad, 91 Mo. 357; Hyde v. Railroad, 110 Mo. 272; Perse v. Railway, 51 Mo. App. 171; Cole v. Railway, 47 Mo. App. 624; Jones v. Railway, 59 Mo. App. 137; Jones v. Railway, 52 Mo. App. 381, and cases cited; Nance v. Railroad, 79 Mo. 196. (2) At the close of all the evidence the court should have sustained a demurrer requested by defendant. Weaver v. Railway, 60 Mo. App.

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207; Eswin v. Railway, 96 Mo. 290. The trial court erred in giving inconsistent and conflicting instructions to the jury. It is erroneous to give inconsistent instructions. Henschen v. O'Bannon, 56 Mo. 289; Price v. Railroad, 77 Mo. 508; Stevenson v. Hancock, 72 Mo. 612. An instruction in itself erroneous can not be supplied by one given in behalf of the other party. Goetz v. Railroad, 50 Mo. 472; Jones v. Railway, 59 Mo. App. 137. Although the court correctly gave "instruction number 6" on behalf of the defendant, this did not cure the error in "instruction number 4." Welch v. Railroad, 20 Mo. App. 477 and cases cited.

ELLISON, J.—This action was instituted by plaintiff to recover damages accruing to plaintiff by reason of defendant's engine and cars killing two of his horses and wounding another. The judgment in the trial court was for plaintiff.

There was much evidence heard as to the sufficiency of defendant's fences, gates and cattle guards. But it seems to be conceded that the animals got upon the track through and and over the cattle guards and the sole question relates to the question of whether they were sufficient, ordinarily to turn stock. Defendant's road runs through the plaintiff's farm. There was one guard on the north side and one on the south side of the farm. The horses entered the right of way (probably from the public road) through the north guard and wandered thence down along the track over defendant's right of way to the south guard where they passed out of the farm by going over the south guard and thence on south on the right of way between defendant's fences about one quarter of a mile to where they were struck.

The evidence should have been confined to the sufficiency of the cattle guards, whereas evidence was introduced tending to show a defective gate and fence and an instruction number 4, was given for plaintiff on a hypothesis that t animals got upon the track through a defective fence

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yet there was an instruction for defendant which told the jury that there was no evidence tending to show an entrance through defendant's fence. To add to the confusion which must have resulted from this conflict instruction number 4, for plaintiff contained a declaration that it was not necessary to plaintiff's recovery for him to show the exact place where the horses got upon the right of way. This may be true, but under the evidence in this case and the instructions referred to this only tended the more to confuse the situation. Here the animals entered the right of way over a cattle guard and thence continued over the right of way through another guard to the point of collision, and the sufficiency of these guards is the question for determination. With the foregoing exceptions the action of the court on the instructions given and refused appears to have been proper.

The judgment is reversed and cause remanded. All concur.

A. A. THUMMEL, Appellant, v. C. H. DUKES et al., Respondents. 82 53 / 99 575

Kansas City Court of Appeals, December 4, 1899.

1. **Sales:** BREACH OF WARRANTY: MEASURE OF DAMAGES: INSTRUCTIONS. Where a chattel sold is not as represented the measure of damages is, if it is valueless, the whole of the purchase price; but if it is good for anything, the measure is the difference between its real worth and the price given; and an instruction directing a finding if the chattel was worthless for the purpose for which it was sold, is erroneous.

2. **Trial Practice:** INSTRUCTIONS: CONFLICTING AND CONFUSING. Instructions manifestly inconsistent and confusing are erroneous.

Appeal from the Nodaway Circuit Court.—*Hon. C. A. Anthony,* Judge.

REVERSED AND REMANDED.

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A. M. Tibbels and *E. A. Vinsonhaler* for appellant.

(1) The instruction for defendant is here printed in form and spacing just as the jury saw it. The first division directs a verdict for the defendant, the last part of it directs one for the plaintiff. They would naturally read them separately, and hence the error. They are directed to find for the defendants if they find said animal was worthless as a work animal or brood mare. This, of course, is not the law. Machine Co. v. Brady, 67 Mo. App. 292. Contradictory instructions are always error. Bluedorn v. Railroad, 108 Mo. 439-450. An instruction inconsistent with itself is erroneous. Wood v. Steamboat, 19 Mo. 529. "A contradiction between instructions so far from correcting the evils of either, multiplies them both." State v. Nauert, 2 Mo. App. 295.

B. R. Martin and *W. W. Ramsay* for respondents.

(1) Under this head appellant seeks to divide up defendant's instruction and fight it by piecemeal. Note the efforts of astute counsel. They seek to separate the three several propositions submitted by the trial court to the jury and to wage war against the three defenses one at a time, but we submit to this court that it has often been ruled in this state when the instructions taken altogether given at a trial, fairly present the case and the several issues to the jury, then no error has been committed. Noble v. Blount, 77 Mo. 235; Schooler v. Schooler, 18 Mo. App. 69; McKeon v. Railway, 43 Mo. 405; Meade v. Railway, 68 Mo. App. 92; Voegeli v. Marble & Granite Co., 56 Mo. App. 678.

SMITH, P. J.—This is an action commenced before a justice of the peace to recover on a promissory note for $140. It is conceded that the note was given for the purchase price of a mare. The defense was, that at the time of the purchase

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the plaintiff falsely represented to the defendants that the mare was seven years old, a good work and brood mare, and that she was, in fact, of no value. There was a trial in which defendants had judgment and the plaintiff appealed.

The plaintiff assails the judgment on the ground that the trial court erred in its action in giving an instruction for the defendants which told the jury, that if they believed from the evidence that at the time defendant Dukes purchased said mare, he purchased her for a work animal and a brood mare, and they found from the evidence that she was not a work animal nor brood mare, then on that state of facts, if they found said animal was worthless as a work animal or brood mare, they should find for the defendant. But if they found from the evidence that such representations were not made or that the mare was as represented, they should find for the plaintiff, and assess his damages at the face of the note, with interest thereon at ten per cent from March 4, 1887, with annual rests—that is, compound interest. But if they found from the evidence that the representations as above set forth as to the age, working qualities or breeding, or any of them were made; that said representations, or any of them, were untrue, and they yet found from the evidence that the mare was of some value; then in that case they should, from the evidence, ascertain the difference in the value of said mare had she been as represented and her value as she was in fact, deduct such difference from the agreed price, $140, and upon that difference calculate interest as above, and find for plaintiff in the sum or amount so ascertained.

It is thus seen that the jury were in effect told that if the mare was worthless as a brood mare or work animal to find for defendants. This was error for she might have been of value for some other purpose. Brown v. Weldon, 27 Mo. App. 251; Hayner v. Churchill, 29 Mo. App. 676; Machine Co. v. Brady, 67 Mo. App. 292. Before the defendants were entitled to entirely defeat the recovery it was necessary for them

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to show that the mare was of no value for any purpose and the jury should have been so directed.

It is true, as has been further seen, that this instruction, in another paragraph thereof, also told the jury that if they found the mare was of some value then to ascertain the difference between that value and her value had she been as represented by plaintiff. These enunciations were manifestly inconsistent and confusing, and therefore erroneous. Bluedorn v. Railway, 108 Mo. 439; Wood v. Steamboat, 19 Mo. 529; State v. Nauert, 2 Mo. App. 295.

The judgment must be reversed and cause remanded. All concur.

THE STATE OF MISSOURI, Respondent, v. ED TOTMAN, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Selling Liquor: MERCHANTS' LICENSE: DEFENSE. A license applied for in October with bond filed but not issued until the May following will not protect the applicant on an indictment for sale of liquor made between said dates without dramshop keeper's license. The license must be secured before the sale.

Appeal from the DeKalb Circuit Court.— *Hon. W. S. Herndon*, Judge.

AFFIRMED.

Turney & Goodrich and *F. B. Ellis* for appellant.

The defendant was not guilty of a violation of the dramshop law. The proof shows, if it shows anything, that the defendant was the proprietor of the drug store, and that he had in his employ a pharmacist. He was not indicted under section 4621 of the Revised Statutes of 1889, which provides, no druggist, proprietor of a drug store, or pharmacist, shall sell

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or give away intoxicating liquors in any quantity less than four gallons, unless upon a prescription of a physician. The defendant had a stock of drugs and was at the date of the sale running a drug store and belonged to that class of persons. He should have been indicted as such. State v. Rafter, 62 Mo. App. 101; State v. Piper, 41 Mo. App. 160; State v. Davis, 76 Mo. App. 586; State v. Williams, 69 Mo. App. 286.

ELLISON, J.—Defendant was indicted, tried and convicted for selling intoxicating liquor in less quantities than three gallons without having a license as a dramshop keeper or other legal authority so to do.

As we gather from the record, defendant endeavored to show that he was a druggist operating under a merchant's license, the effect of which would have been that he was not indicted properly; since he should in that case have been proceeded against under the Druggists and Pharmacists law. State v. Piper, 41 Mo. App. 160; State v. Rafter, 62 Mo. App. 101; State v. Davis, 76 Mo. App. 586; State v. Williams, 69 Mo. App. 286.

In thus attempting to show that he was a druggist he showed that his stock of merchandise was what is generally and usually known as a general stock of drugs and medicines. He further introduced a merchant's license reciting that it was applied for and that bond was given on October 8, 1897, and that he was authorized to vend goods, wares and merchandise for twelve months from that date. This license was however not signed and attested by the clerk of the county court until the twenty-fourth day of May, 1898, on which day it was indorsed: "Granted this 24th day of May, 1898." It was shown that the collector was not in his office when defendant gave the bond and went after the license, but he was informed of the matter, perhaps next day, and answered that it was all right, that he "would be right over" (meaning to defendant's place of business). It seems however, that he did not go and

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the license was not in fact issued to defendant until the twenty-fourth of May, which was after the sale charged. The evidence amounts simply to this: Defendant gave bond and had the license drawn up and dated before the sale of the liquor; but he did not pay the money or take out the license until after the sale. It is plain that it should not afford him any protection. It was his duty to take out the license before making any sales. He was therefore not a druggist or merchant of any kind and was properly indicted for selling liquor without a dramshop keeper's license. And this was the view taken by the trial court. State v. Davis, 76 Mo. App. 589.

An examination of the point made on the court's refusal to grant a continuance satisfies us that there was no abuse of discretion.

The judgment is affirmed. All concur.

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THE STATE OF MISSOURI, Respondent, v. HENRY SHAFER, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Selling Liquor: SUFFICIENCY OF INDICTMENT: PLEA OF GUILTY. **An indictment for selling liquor which charges that the defendant being then and there a merchant, etc., sufficiently charges that he was indicated as a merchant. It is not required to set out the facts constituting him a merchant, especially where he pleads guilty as charged in the indictment.**

Appeal from the DeKalb Circuit Court.—*Hon. W. S. Herndon,* Judge.

AFFIRMED.

Hewitt & Blair for appellant.

(1) If being evident that the indictment was drawn under chapter 111, Revised Statutes 1889, it is insufficient and the judgment can not be permitted to stand because it fails to

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show upon its face that appellant is a merchant as defined by statute, section 6894, Revised Statutes 1889. State v. Runyan, 26 Mo. 167; State v. Ryan, 30 Mo. App. 159 and cases cited; State v. Cox, 32 Mo. 566; State v. Willis, 37 Mo. side page 193 (122); State v. Jacobs, 38 Mo. side page 379 (234). (2) Section 6915, chapter 111, Revised Statutes 1889 is leveled at licensed merchants. The essence of the offense is the selling of vinous, fermented or spirituous liquors, being at the time a licensed merchant. State v. Whittaker, 33 Mo. 459; State v. West, 34 Mo. 425; St. Louis v. Sternberg, 69 Mo. 303; State v. Williams, 69 Mo. App. 286; State v. Gibson, 61 Mo. App. 368. (3) There being neither allegation, proof nor admission within the four corners of the record that defendant was a licensed merchant at the date of the sale, the fact is fatal, there being nothing upon which to base or to sustain the judgment. The gravamen of the offense, under chapter 111, Revised Statutes 1889, consists in selling vinous, fermented or spirituous liquors in less quantities than five gallons, while holding a merchant's license, section 6915, R. S. 1889. 1 Bishop's New Crim. Law, secs. 77-88; State v. Fanning, 38 Mo. 409; State v. Ryan, 30 Mo. App. 159; State v. Williams, 69 Mo. App. 284-286; State v. Alexander, 56 Mo. 131; State v. Randall, 73 Mo. App. 464.

Frank Costello and *Mack Roberts* for respondent.

(1) The indictment in the case at bar is for a violation of section 6915, Revised Statutes 1889, and since the term merchant is defined by statute it is unnecessary to incorporate the definition as a charge in the indictment. (2) The appellant further insists that the indictment fails to allege that the defendant was a licensed merchant. The indictment makes use of this language, "being then and there a merchant and dealer in drugs and merchandise, did," etc. The law recognizes only those as merchants who have merchant's licenses, and chapter

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111, Revised Statutes, section 6915 contemplated licensed merchants because without a license one would not be a merchant and would be amenable to the dramshop law. State v. Carnahan, 63 Mo. App. 246 and State v. Goff, 66 Mo. App. 493. (3) The indictment substantially follows in form the indictment held good in State v. Ford, 47 Mo. App. 601. There has been no defect or imperfection that tends to prejudice the substantial rights of the defendant. Sec. 4115, R. S. 1889.

GILL, J.—Defendant was indicted as a merchant for selling intoxicating liquors in less quantity than five gallons, contrary to section 6915, Revised Statutes 1889. It seems that defendant first moved to quash the indictment, but for what reason does not appear. Subsequently, however, as the record shows, defendant appeared in open court, withdrew his motion to quash and entered a plea of guilty—the record reading: "Now comes the prosecuting attorney for the state, and also comes the defendant herein, in person and in presence of his attorneys and counsel, and in open court pleads guilty to selling liquor without taking out or having a license as a dramshop keeper, as charged in the indictment." And thereupon the court imposed a fine of $100.00, and from a judgment therefor—a motion in arrest being filed and overruled—defendant has appealed.

The indictment is attacked on the alleged ground that it failed to show upon its face that defendant was a licensed merchant as defined by the statute. We think the objection not well taken. The indictment charges that on a certain day in DeKalb county "one Henry Shafer being then and there a merchant and dealer in drugs and merchandise did then and there unlawfully sell to Fred Dill, vinous, fermented and spirituous liquor in less quantity than five gallons, to wit," etc. While now it is true that the indictment does not set out the statutory definition of a merchant or that he was licensed as such, yet it declares against the defendant as a merchant.

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This was sufficient. When it came to trying the case it may have been necessary, as a matter of evidence, to prove that defendant filled the statutory definition of merchant; still, as was said in State v. Carnahan, 63 Mo. App. 244, "it does not follow that such matter of evidence need be alleged in the indictment." The authorities cited by defendant's counsel have no bearing on the question here presented.

More than this, the defendant pleaded guilty "as charged in the indictment." It may be well contended that thereby defendant confessed that he was a merchant as defined by the statute, and that as such he violated the law. For under section 6915, as a merchant he was enjoined not to sell liquors in any quantity less than five gallons for any purpose whatever.

There is no merit in the appeal and the judgment will be affirmed. All concur.

THE STATE OF MISSOURI, Respondent, v. JENNIE WILEY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Criminal Procedure:** FORMER CONVICTION: SUBMISSION TO THE COURT. On a trial of an indictment for a misdemeanor under the statute, the trial court has authority to try a plea of former conviction without the aid of a jury when the parties agree thereto, and the proceedings of the court will be presumed to be regular even where the record is silent as to the waiver.

2. **Appellate Practice:** CONTINUANCE: BILL OF EXCEPTIONS. Where the bill of exceptions is silent as to the action of the court in refusing a continuance, the appellate court must ignore complaints of such action since such application and the rulings of the court thereon are no part of the record proper.

Appeal from the Buchanan Criminal Court.—*Hon. R. E. Culver*, Judge.

AFFIRMED.

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Crow & Eastin for appellant.

(1) The court erred in failing to call a jury to try the question of former conviction. State ex rel. v. Withrow, 133 Mo. 519; State v. Van Matre, 49 Mo. 268; Railway v. Story, 96 Mo. 611. Under the common law the defendant could not waive a jury in this case and our bill of rights, section 28, refers to the common law jury. See cases cited, *supra*; also Concemix v. People, 18 N. Y. 135; State v. Stewart, 89 N. C. 563; Stewart v. Kimball, 43 Mich. 448.

James W. Mytton for respondent.

(1) This charge against the defendant being a misdemeanor, a jury can be waived and the record need not show an express waiver. State v. Larger, 45 Mo. 510; State v. Moody, 24 Mo. 560; R. S. 1889, sec. 4190. (2) The defendant waived a jury both by not objecting at the time and leading the court into whatever action it pursued in the hearing of the plea, and not calling the trial court's attention to her desire for a jury, and it is too late to object for the first time in the motion for new trial. State v. Larger, *supra*. (3) The record shows the defendant waived a jury.

GILL, J.—Defendant was indicted, tried and convicted of keeping a bawdy house in the city of St. Joseph. The grounds of defendant's appeal will be noticed in the order of her counsels' brief.

At the trial defendant interposed what is denominated a plea of former conviction for the same offense. In this she alleged that she had theretofore been found guilty in the recorder's court of St. Joseph of the identical offense charged in the indictment. As to this the record reads: "Comes now the defendant and files plea in bar which is now here taken up, considered by the court and overruled, and this cause

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coming up regularly to be heard, and by agreement of prosecuting attorney and the defendant, jury is waived, cause submitted to the court, evidence heard, the court finds the defendant guilty and assesses her punishment at a fine of two hundred dollars."

The complaint now is that the trial court erred in failing to call a jury to try the plea of former adjudication. The point is not well taken. The record fails to show an express waiver of a jury trial as to this issue, but it appears that defendant went to trial thereon before the court without objection. This must be treated as a waiver. While in felony cases the accused can not waive jury trial, yet the rule is different in misdemeanor cases. The statute (section 4190, Revised Statutes 1889) provides, that "the defendant and prosecuting attorney, with the assent of the court, may submit the trial of misdemeanors to the court, whose finding in all such offenses shall have the force and effect of the verdict of a jury." And in State v. Larger, 45 Mo. 510, it was said: "It is not required that such submission shall be entered on the minutes, or that it shall in any manner become a matter of record. It is not to be presumed, therefore, from the silence of the record, that the court proceeded irregularly and without authority. If the defendant was not willing to be tried by the court he would have objected at the time. Having taken his chances with the court, it is too late now to object that he was not tried by a jury." The foregoing is a complete answer to the defendant's first contention.

The remaining objections to the judgment are even less meritorious than the one above noticed. As to the court's action in refusing a continuance it is sufficient to say, that the bill of exceptions contains nothing in relation thereto. It is there alone we look for such matters, and unless they are there preserved such complaints will be ignored in the appellate court. Applications for continuances and the court's rulings thereon constitute no part of the record proper, and can only

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be brought into the record by bill of exceptions signed by the judge. And as to the sufficiency of the evidence to sustain the court's finding, an examination of the record discloses ample to sustain it.

The judgment will be affirmed. All concur.

ANDREW L. OBERG, Respondent, v. ST. JOSEPH TOWN MUTUAL FIRE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Trial Practice: AMENDMENT BY INTERLINEATION: RECORD ENTRY: WAIVER. Where plaintiff has leave of court to amend his petition by interlineation and the record sets out the amendment, though in fact it is not entered in the petition and the trial proceeds without objection, the case will be treated as if the amendment had been actually interlined.

Appeal from the Buchanan Circuit Court.—*Hon. A. M. Woodson,* Judge.

AFFIRMED.

James M. Wilson for appellant.

If a party obtains leave to amend he may elect to make the amendment or not, as he pleases; and if he fails to amend, the issue made by the original pleading should be tried. Permission to amend does not *per se* amount to an amendment, but the amendment must be actually made either by altering the pleading or by filing a new one. Lohrfink v. Still, 10 Md. 530; Kimball v Gearhart, 12 Cal. 46; Briggs v. Bruce, 9 Colo. 282.

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Benj. Phillip for respondent.

It has been settled beyond all question in this jurisdiction that where the record shows that the court, by an order, granted permission to amend a petition by interlineation and the formal amendment is not actually made, but the defendant proceeds to trial, without objection, the appellate court will treat the case as if the amendment had been made. Merrill v. St. Louis, 83 Mo. 244, 250; Underwood v. Bishop, 67 Mo. 374; Young v. Glascock, 79 Mo. 574; Stone v. Ins. Co., 78 Mo. 655; Fulkerson v. State, 14 Mo. 49. And this is the law in other jurisdictions. Lyon v. Brown, 6 Baxt. (Tenn.) 64; Mfg. Co. v. Boyle, 46 Kan. 202; Laidsborg v. Hagerman, 31 Kan. 599; Brantz v. Marcus, 73 Iowa, 64; Hellyer, v. Bowser, 76 Ind. 35; Eaton v. Case, 17 R. I. 429; Holland v. Crow, 12 Ired. (N. C.) 275; Ufford v. Lucas, 2 Hawks (N. C.) 214; 1 Ency. Plead. and Prac. 641; Krester v. Carey, 52 Wis. 374; Seitz v. Buffum, 14 Pa. St. 69; Eister v. Reinman, 11 Pa. St. 147; Ballou v. Hill, 23 Mich. 60; 1 Ency. Plead. & Prac. 641; Kuhn v. Gustafson, 73 Iowa, 633; Hawks v. Davenport, 5 Allen (Mass.), 390; Horne v. Meakin, 115 Mass. 326; Booth v. Hubbard, 8 Ohio St. 248; Palmer v. Lesue, 3 Ala. 741.

ELLISON, J.—This is an action on a fire insurance policy. Plaintiff recovered in the trial court.

Plaintiff's petition was defective. He asked and obtained leave of court to amend it by interlining that which would cure the defect. In fact, the interlineation was not made though the record sets out the amendment. The trial was however proceeded with without objection and evidence responsive to the amendment was heard without objection. Defendant's contention is that there was no amendment since it was not actually written in the petition. We are of the contrary opinion. Merrill v. City of St. Louis, 83 Mo. 244; Underwood v. Bishop, 67 Mo. 374.

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The amendment was asked and leave granted. No objection being made at the time to its not being actually interlined in the petition, it will be treated as done. And so the question has been decided in other states as shown by authorities cited in plaintiff's brief. Affirmed. All concur.

THE BURNES ESTATE, Plaintiff, v. OLIVIA C. PORTER et al., Respondents, THE AYR LAWN COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Partition: ESTOPPEL: TWO CORPORATIONS WITH SAME OFFICERS. In a partition proceeding in which B. corporation is plaintiff against certain heirs, L. corporation, which after decree interpleads as to certain matters of rents, etc., is not estopped to set up its claim to such rents by the fact that B. corporation in the proceedings for the decree had successfully objected to any evidence relating to said rents, even though the two corporations have the same officers.**

2. **———: RENTS IN COMMON: MORTGAGEE IN POSSESSION: PARTIES: TAXES AND REPAIRS. Where a mortgagee of an undivided interest in realty is in possession and is compelled for the protection of the entire estate to pay out money for taxes and repairs he has an equitable lien against the other interests for reimbursement for such necessary expenditures; and in an action between the mortgagor's grantee and the other tenants in common said mortgagee is a proper party for the purpose of enforcing against such cotenants their proper proportion of such expenditures.**

3. **———: MORTGAGEE IN POSSESSION: LIEN FOR EXPENDITURES: SPLITTING DEMANDS: COTENANCY. The lien of a mortgagee in possession for necessary outlays in protecting the estate, becomes a part of the mortgage debt and expires with the foreclosure; but a foreclosure can not interfere with the mortgagee's lien on the interest of the other tenants in common for necessary expenditures.**

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Appeal from the Buchanan Circuit Court.—*Hon. A. M. Woodson*, Judge.

REVERSED AND REMANDED.

STATEMENT BY GILL, J.

This is a suit for the partition of certain real estate in St. Joseph. The controversy here is not as to the title of the property, but as to whether or not The Ayr Lawn Company, a corporation, should be allowed to come into the case as a party defendant and share in the proceeds, because of having paid certain taxes, etc., on the undivided half interest owned by the other defendants.

The facts are somewhat complicated, but to a full understanding of the case it seems only necessary to state, that in the year 1886, W. H. Rush, Sr., died owning the property mentioned and leaving six children as heirs—or rather as devisees under a will. Subsequently three of these children, for moneys borrowed, executed a mortgage on their own half interest in the property to the Ayr Lawn Company. In November, 1894, the Ayr Lawn Company and the executor of the Rush estate entered into an agreement—reciting the mortgage indebtedness of the three Rush heirs, that the Lawn Company had paid off certain tax incumbrances and thereby saved a forfeiture of the property and that certain other taxes were also due and unpaid—and it was then agreed that the Lawn Company should, as a mortgagee after condition broken, take possession of the real estate, collect the rents and apply same, first to the payment of all taxes and necessary repairs, including such as had already been paid, and the balance of said rents if any was to be divided between the executor and said Lawn Company, the amount received by the latter to be applied on the debt against said three heirs. It may be well also to state here that the executor of the Rush estate was by the will of the deceased authorized to take charge of the real

estate, collect the rents, etc. In pursuance of this agreement between the executor and the Lawn Company the latter took charge of the property, collected the rents, made necessary repairs and paid the taxes until June 18, 1896, when the undivided half of said real estate was sold in a foreclosure sale of the lawn company's mortgage, and the plaintiff Burnes estate, a corporation, became the purchaser. During said time however, the Lawn Company, mortgagee in possession, paid out for redemption from tax sales, taxes levied and repairs about $1,100 more than it received.

The Burnes estate, a corporation, brought this action in partition claiming the one-half interest in the real estate and alleging that defendants (three of Rush's children and their descendants) were owners of the other half. The title was so adjudged by the court—a part of the property was divided in kind by the commissioners, but a portion was reported not susceptible to division in kind and such portion was therefore ordered to be sold so that the proceeds might be divided, half to the plaintiff Burnes estate, and the other half to the defendants.

Thereupon, at the January term, 1899, of the Buchanan county circuit court, the Ayr Lawn Company presented its petition to the court asking that it be made a party defendant in the case. In said application the facts above stated were set out in substance, and it was prayed that said lawn company be made a party and allowed to participate in and receive out of the proceeds of the property sufficient to recompense it for the taxes, etc., paid by it to protect the property. The defendants contested the alleged right of the Lawn Company, and on a hearing of the application, the court refused to admit said lawn company as a party defendant.

It becomes necessary to state further that the court appointed a referee to take an account of the rents and profits received, as well as the expenditures incurred by the Burnes estate during its control of the property, and that said referee

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made his report thereof. Said referee took no account of such matters occurring prior to the mortgage sale June 18, 1896, when a half interest in the property was purchased by the Burnes estate. I mention this simply to throw light on the judgment entry made by the trial court which in the record reads:

"That thereupon the court held that the evidence showed that the officers of the Burnes estate, plaintiff in this case, and the Ayr Lawn Company were the same individuals and that upon the hearing before the referee, counsel for Burnes estate objected to the defendants herein introducing evidence of rents received and expenditures made prior to the 18th day of June, 1896, that said Ayr Lawn Company is now estopped from asserting its rights to the moneys expended upon and for the preservation of said land prior to said 18th day of June, 1896, and from being made a party defendant in this suit, and thereupon overruled said application of the Ayr Lawn Company to be made a party defendant, to which action of the court in overruling said application the said Ayr Lawn Company then and there excepted at the time."

Brown & Dolman for appellant.

(1) There was no money arising from rents and profits while appellant was in possession to pay the amount paid for redemption, and it is here contending simply that it has the right to come into this case and have the portion that went to benefit the title of defendants paid out of the proceeds of the sale of their part of the land. R. S. 1889, secs. 7137, 7135, 7134; 2 Jones on Mort., sec. 1080 and cases cited. And he may even have a preference to that extent over prior incumbrancers whose liens the payment was served to protect. 2 Jones on Mort., sec. 1134. (2) And even in the absence of any contract for that purpose the mortgagee in possession is entitled to allowance for repairs, and the fact that the necessary repairs of the premises exceed in cost the amount of the rents

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and profits is no objection to their allowance. 2 Jones on Mortgages, sec. 1129; Bollinger v. Chouteau, 20 Mo. 89. It is the duty of the cotenant to sustain and protect the common title. Hinters v. Hinters, 114 Mo. 26; 2 Jones on Real Property, sec. 1853; Eads v. Rutherford, 114 Ind. 273; Moon v. Jennings, 119 Ind. 130, 134; Fischer v. Eslaman, 68 Ill. 78.

James W. Boyd for respondents.

(1) The claim of the Ayr Lawn Company, secured by the alleged deeds of trust, constitutes its only claim to any remuneration for paying taxes on said land. The claim for taxes, if any were paid by the Ayr Lawn Company, was but an incident to the original indebtedness, and when the deeds of trust were foreclosed to satisfy the original indebtedness, the said Ayr Lawn Company had no further right, title or interest in and to said land, or any part thereof, nor did it have thereafter, if it ever had, any claim or lien against said land, or any part thereof, on account of the alleged payment by it of said taxes. When the mortgage is ended the mortgagee's claim based thereon or growing out of the mortgage is also extinguished. Hitchcock v. Merrick, 18 Wis. 375; Johnson v. Payne, 11 Neb. 279. (2) In deciding appellant's application to be made a party to the suit, the court found by the evidence taken before the referee that the Burnes estate and the Ayr Lawn Company were practically one and the same thing, having the same president, manager, secretary, treasurer, bookkeeper, and having their accounts kept in the same book, intermingled with each other, and that Mr. L. C. Barnes, the president, manager, controller and business director of both of these corporations was present during the time the referee was hearing the case before him, and objected to any account taken prior to June 18, 1896, on the ground that whatever claims may have existed prior to that time, were claims which existed only between the executor of the estate of William M. Rush, Sr., deceased, and the Ayr Lawn Com-

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pany. This contention on the part of the Ayr Lawn Company, represented before the referee by Mr. Burnes and his attorneys in the case was sustained by the referee, and a reference to the provisions of the will, will discover the grounds upon which this contention was made by Mr. Burnes, and sustained by the referee. (3) We also contend that where the statutes give a right to a cotenant to pay the taxes upon his undivided interest separately from the payment of taxes upon the other interest, and that he has not by statute been made liable for all the taxes, he would have no lien under any circumstances for the payment of the taxes due from his cotenant, and that taxes so paid by him are voluntarily paid, at least to the extent that he can thereby require no lien upon the title of his cotenant for reimbursement.

GILL, J.—I. It seems proper, in the first place, to notice the ground upon which the court denied the application of the Ayr Lawn Company to become a party defendant in this suit. The record above quoted shows, that the trial court entertained the view that, because the plaintiff Burnes estate (a corporation) and the Ayr Lawn Company had the same persons as officers, therefore the latter corporation was estopped by the conduct of the former. Or, to be more specific, because the Burnes estate, through its counsel, and at the hearing before the referee, objected to an accounting of the rents and expenditures prior to June 18, 1896 (when said Burnes estate purchased the property under the foreclosure sale) that therefore the Lawn Company was "estopped from asserting its right to the moneys expended upon and for the preservation of said land prior to said 18th day of June, 1896."

With all deference to the trial judge we must reject the above as a valid reason for denying the Lawn Company's application. The record shows that the Burnes estate and the Ayr Lawn Company are separate and distinct corporate entities. The same persons it seems fill offices in the two cor-

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porations, but they were separately organized and the stockholders are different. The Burnes estate corporation is and has been since the institution of this suit, a party thereto (the plaintiff), it was in court and present at the hearing before the referee, while the Ayr Lawn Company was not. Nothing that was said or done then by the former in the investigation before the referee can be used to estop the latter. The counsel representing the Burnes estate in that inquiry can not, in any sense, be deemed the representative of the Lawn Company. More than that the Burnes Estate corporation, who purchased the real estate at the foreclosure sale in June, 1896, was under no obligation for or had any interest in the rents collected or taxes paid by the lawn company prior to that sale. Such rents had been collected and such taxes paid by the lawn company, another and different corporation.

II. The case then is this: The Ayr Lawn Company, while in possession of the property as mortgagee of an undivided half interest and with the knowledge and consent of the executor having the unmortgaged half interest in charge, paid out in excess of the rents received about eleven hundred dollars to remove certain tax liens and for necessary repairs on the entire property. After this the real estate was sold under the mortgage, plaintiff became the purchaser of the half interest thus sold and then brought this action for partition. The Ayr Lawn Company has intervened and asks to be admitted as a party defendant so as to charge the interest of the other defendants (and which was not covered by the mortgage) with their share of this redemption money and repairs which the mortgagee, their cotenant, paid for the common benefit.

In our opinion the lawn company presents good and substantial reasons for its claim. It appears to have such an interest in the real estate about to be partitioned as to justify its appearance as a party to the proceedings. "Every person having any interest in such premises, whether in possession or otherwise, shall be made a party to such petition." Sec. 7135,

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R. S. 1889. Again: "Any person having an interest in such premises, whether the same be present or future, vested or contingent, though not made a party in the petition, may appear and be made a party on application for that purpose," etc. Sec. 7137.

While the Lawn Company was holding the possession of the property under a forfeited mortgage covering the half interest, and by and with the consent of the executor who was the righful trustee in charge of the other half interest, it undertook and did pay for the common benefit of the entire property all taxes and necessary repairs. By so doing and thus removing the incumbrance and protecting the entire property the Lawn Company became subrogated to an equitable lien against the haf interest vested in the other parties. "A tenant in common who has removed an incumbrance from the common property is entitled to contribution from his cotenants. To secure such contribution, a court of equity, acting in a suit for partition in favor of the cotenant removing the incumbrance, will enforce an equitable lien of the same character with that which is removed." Freeman on Cotenancy & Partition [2 Ed.], sec. 512. "The liability to contribute is the result of a general equity, founded on the equality of burthens and benefits. To establish the right of contribution, the plaintiff must show that his payment has removed a common burthen from the shoulders of himself and the defendant, and that they are each benefited by it." Freeman on Cotenency & Partition, sec. 322. The same authority sustains a claim for the necessary repairs to the common property. Judge Cooley in his work on Taxation, 467 [2 Ed.], thus expresses the rule: "Each tenant in common is bound to pay on his own interest; but if one is compelled to pay upon all, he may charge the interest of his cotenant with the proportionate part which such cotenant should have paid." To the same effect, see 2 Jones on Real Property, secs. 1854, 1855 and 1917; Eads v. Ritherford, 114 Ind. 273; Hinters v. Hinters, 114 Mo. 26.

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In the last case it was said: "Tenants in common occupy a confidential relation to each other, and because of this relation there is an implied obligation on the part of each to sustain and protect the common title. It is therefore a general rule that if a tenant in common buy up an outstanding title or incumbrance, the purchase will be deemed to have been made for the benefit of all the cotenants, the other cotenants being bound, however, to contribute their respective proportions of the consideration paid for the outstanding title or incumbrance."

Applying then the doctrine of these authorities to the case in hand, it would seem clear that if the Ayr Lawn Company—while it held title and possession of the mortgaged half of the property wherein the defendants at the same time held the other half—paid off and discharged certain tax liens on the entire property, and paid for the repairs necessary to preserve the property, then said lawn company should have the right to charge with its proper portion the undivided half interest of the defendants, which received a benefit from such payments. When said incumbrances and charges were so paid off by the lawn company, it and the defendants owning the other half interest in the property covered by the Lawn Company's mortgage, were tenants in common, and there was then an implied obligation resting on said defendants to reimburse their cotenant for such sums of money as said cotenant paid for their benefit.

III. But it is insisted that by the foreclosure of the Lawn Company's mortgage in June, 1896, and the sale of the property thereunder, the said Lawn Company lost its lien for money paid on account of the tax liens, etc. The basis of this contention is, that even where the mortgagee shall have paid taxes and removed incumbrances from the mortgaged property, the money so paid becomes merged into and forms a part of the mortgage debt, and that as the foreclosure and sale operates to extinguish the mortgage lien so is the lien for such payment of incumbrances extinguished—that the mort-

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gage debt proper and such incidental claims are one and the same inseparable demand. The authorities relied on by defendants' counsel are to this effect, that while the mortgagee has the right to pay incumbrances, taxes and the like which threaten his security and to hold the same as an enforcible lien the same as the mortgage debt, yet such incidental liens continue only during the life of the mortgage—that when the mortgage becomes extinct by foreclosure or otherwise the said liens for taxes or other incumbrances likewise expire. This is the full scope of the authorities relied on by defendants' counsel. See Hitchcock v. Merrick, 18 Wis. 357; Johnson v. Payne, 11 Neb. 269; Horrigan v. Wellmuth, 77 Mo. 542.

If now the case in hand involved simply a claim by the mortgagee against the mortgagor then the above law would find application, for it would be said that the lien for the mortgage debt and the lien for taxes paid by the mortgagee to protect the mortgage security were one and inseparable, and that the satisfaction or foreclosure of one had extinguished the other—that the mortgagee would not be allowed to split up his cause of action, etc. But that is not this case when we consider the rights of the Lawn Company as against the defendants who never gave any mortgage on their undivided half of the property, and who were tenants in common with the Lawn Company while it held the possession and paid taxes on the entire property. By payment of these incumbrances on the entire property, the lawn company, as mortgagee, became entitled to add the one-half of the sums so paid to the mortgage debt to collect this one-half from the proceeds of the foreclosure sale of the one-half. But as to the amounts paid for the benefit of the owners of the other one-half (whose interest was not mortgaged) the claim for reimbursement rests on a different basis, to wit: That of one tenant in common against his cotenant. This, too, was a claim or lien disconnected from the mortgage lien. The Ayr Lawn Company could not claim as against the mortgagor and as a part of its

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mortgage lien anything it had paid for the relief and benefit of the one-half owned by these defendants and which was unmortgaged. "If the mortgagee of an undivided half interest pay the whole tax levied upon the premises in order to preserve the lien, he can only charge against the mortgagor one-half of the amount so paid." 2 Jones on Mortg. [4 Ed.], sec. 1134. But clearly the amount paid on the other half not covered by the mortgage is a charge against said other half.

In our opinion then, the record shows that the Ayr Lawn Company has an interest in the real estate about to be divided, and it ought to be allowed to come into the case as a party so that such interest can be protected. And so holding, the judgment must be reversed and cause remanded to be proceeded with as herein indicated. All concur.

MARION O. GAY, Appellant, v. MISSOURI GUARANTEE SAVINGS & BUILDING ASSOCIATION, Respondent.

Kansas City Court of Appeals, December 4, 1899.

Insurance: AGENCY: MORTGAGOR AND MORTGAGEE: NOTICE. The fact that a mortgage stipulates that the mortgagor should keep the property insured in some good insurance company to be selected by the mortgagee, and the mortgagee makes such selection, does not constitute the mortgagee the agent of the mortgagor and require him to give notice to the company that additional insurance has been secured when he takes a second mortgage to secure a further loan and directs the insurance for such loan in a different company.

Appeal from the Daviess Circuit Court.—*Hon. E. J. Broaddus,* Judge.

AFFIRMED.

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Ed. E. Yates and *Hicklin & Hicklin* for appellant.

Even though defendant gratuitously undertook to procure this policy in the Royal, it is nevertheless liable to plaintiff for any loss accruing to him thereby, if it performed this office in so negligent a manner as to cause a forfeiture of the Hartford policy. 1 May on Insurance, sec. 124, says: "The agent employed to effect insurance, it scarcely need be said, is responsible to his principal for every negligence in the performance of his duties. That the undertaking was gratuitous is no defense, if it was actually entered on." Wilkinson v. Coverdale, decided in 1790 by the Court of the King's Bench, and reported in 1 Espinasse's Rep. 75.

Alexander, Richardson & Allen for respondent.

(1) If the defendant association had safely guarded its interests better, it would have required the plaintiff to do his whole duty in taking out the insurance. Its failure to do so resulted in a loss of part of its security, but certainly nothing more, and the court below so viewed it. (2) We urge further, that the petition does not state facts sufficient to constitute a cause of action, or to authorize a court of equity to grant the relief prayed for.

ELLISON, J.—The plaintiff seeks to enjoin defendant from foreclosing a deed of trust by a sale of the land described therein. The bill was dismissed by the circuit court.

The case has arisen in this way: Plaintiff borrowed $800 of defendant giving a deed of trust to secure the same. The deed contained a provision that plaintiff, as the borrower, should keep the property conveyed insured in some good insurance company to be selected by defendant, in a sum equal to the amount borrowed. Afterwards plaintiff borrowed of defendant the further sum of $200 and secured its payment

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on the property by giving a second deed of trust with a like provision as to insurance. Plaintiff insured the property for $800 in the Hartford Insurance Co., as provided in the first deed of trust. The policy contained a provision avoiding it if any additional insurance should be taken out without the consent of the Hartford Company. In compliance with the second deed of trust plaintiff took out insurance in the Royal Insurance Co. for $200. But neither he nor the defendant obtained the consent of the Hartford Insurance Co. In consequence, the building on the property having burned, the Hartford Insurance Co. policy for $800 having been avoided by reason of the second insurance being taken without its consent, nothing was realized on said policy to be paid on plaintiff's indebtedness to defendant. The policy for $200 was paid and applied on the indebtedness. Defendant afterwards began to foreclose the deed of trust by sale under the provisions thereof and plaintiff seeks to enjoin it as before stated.

The principal question between the parties is, whose duty was it to notify the Hartford Company of the additional insurance? By the terms of the trust deed itself it was plaintiff's duty to do so, and we can not find in the record where plaintiff has shown that such duty was cast upon defendant. Plaintiff borrowed the money and as a part of the security he agreed to keep up the insurance on the property to the amount of the loan. If the insurance had expired it would have been his duty, under his contract, to take out new insurance. If additional insurance was taken out it was done by him in compliance with his second deed of trust and it became his duty to so take it out that it would not jeopardize the first policy. The insurance, while operating as additional security for the loans, was primarily for plaintiff's benefit. We fail to find anything in the evidence which made it defendant's duty to take care of the insurance. It may have been to its interest to keep watch over plaintiff as a debtor and see that he per-

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formed his duty. That happens frequently between creditor and debtor. But defendant's interest is not necessarily its duty. Nor do we see how the provision that defendant had a right to select the company or companies in which the insurance should be taken alters the matter. That provision was merely that defendant might know that the insurance was in a good and solvent company.

The further argument is made that defendant kept possession of the Hartford policy. There is nothing in such circumstances to change the relation of the parties to the contract. The whole case is that plaintiff contracted to take out and keep certain insurance and he has failed to show that defendant has ever relieved him of such obligation.

The foregoing views result in an affirmance of the judgment. All concur.

ANDREW S. VAN HORN, Appellant, v. SARAH A. VAN HORN, Respondent.

Kansas City Court of Appeals, December 4, 1899.

1. **Divorce: ABANDONMENT: PLEADING: EVIDENCE.** The petition in this case sufficiently alleges abandonment, which the answer admits, but the evidence fails to sustain tne allegations of the answer in regard to support and maintenance.

2. **———: INDIGNITIES.** The defendant's evidence on the question of indignities in this case is held insufficient.

Appeal from the Livingston Circuit Court.—*Hon. E. J. Broaddus*, Judge.

REVERSED AND REMANDED.

Scott J. Miller for appellant.

(1) A divorce is a legal right; the granting or holding of which is in no way dependent upon the discretion of the trial

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court. It is a proposition so elementary as not to require the citation of authorities. The proceedings of that character have always been reviewed on appeal in this state upon the weight of the evidence. Ulrey v. Ulrey, 80 Mo. App. 48; Moore v. Moore, 41 Mo. App. 176; Owens v. Owens, 48 Mo. App. 208. (2) Under the charges in this petition but three things are necessary: Cessation from cohabitation, continuing one year; the intention in the mind of the deserter not to resume cohabitation; absence or conduct acquiescing in the same. Davis v. Davis, 60 Mo. App. 554. (3) The court will review the evidence upon the pleadings and grant the relief prayed for if the evidence is sufficient to maintain it. Hall v. Hall, 77 Mo. App. 606. (4) The court must be ruled by the statutory grounds and evidence thereunder. Deschodt v. Deschodt, 59 Mo. App. 102; Ulrey v. Ulrey, *supra*; Kilpatrick v. Kilpatrick, 80 Mo. App. 70.

Frank Sheetz & Sons for respondent.

(1) The petition states no cause of action. Revised Statutes, sec. 4500, p. 1029; Freeland v. Freeland, 19 Mo. 354; Hoffman v. Hoffman, 43 Mo. 550. (2) There is no desertion in this case. Gillinwaters v. Gillinwaters, 28 Mo. 61; Simpson v. Simpson, 31 Mo. 24; Dwyer v. Dwyer, 16 Mo. App. 427; Gilmer v. Gilmer, 37 Mo. App. 675; Nichols v. Nichols, 39 Mo. App. 294; Scott v. Scott, 44 Mo. App. 605; Droege v. Droege, 55 Mo. App. 486. (4) Appellant has no standing in a court of equity. Neff v. Neff, 20 Mo. App. 182; Davis v. Davis, 60 Mo. App. 555.

SMITH, P. J.—This is an action for divorce. The petition, though somewhat inartificially drawn, charges in substance that the defendant had absented herself from plaintiff, without reasonable cause, for the space of one year, and it is, we think, therefore sufficient.

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The defendant filed an answer and cross-petition, admitting her absence from plaintiff but denying that the same was without reasonable cause. The defendant does not therein allege any specific statutory ground for divorce. In justifying and excusing herself for leaving the plaintiff, she does allege, in substance, that he treated herself and infant children cruelly, in that he failed to provide her with suitable shelter, food and raiment, bed and bedding, or money with which to procure the same. The admissions of the answer and the testimony of the plaintiff clearly established the plaintiff's *prima facie* case entitling him to a decree. The burden of the evidence was cast upon the defendant to rebut the plaintiff's case so established.

We can not discover that the evidence discloses that there was anything in the conduct of the plaintiff to justify the defendant in absenting herself. It may be, and no doubt was true, as the defendant testified that the plaintiff did not provide for their joint use a very luxurious couch, or a "flowery bed of ease," but that, with such bedding as the defendant testifies she added to that of the plaintiff, it was ample to keep them warm during the time they cohabited together: that is, from the latter part of May till the early part of September. According to the defendant's own testimony, the plaintiff provided flour and groceries. To these articles she added meat, lard and vegetables from the store she had on hand at the time of the marriage. It can not therefore be concluded that there was any occasion or reason why either herself or children should have suffered the pangs of hunger.

It seems that the plaintiff's house was only a small cottage with three rooms, but that he had in process of construction a much more pretentious and commodious mansion house. But the defendant abandoned the plaintiff's cottage before his mansion was ready for her reception. It would seem that there ought not to have been any serious fault found with

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plaintiff on account of his failure to provide a suitable house for defendant.

As to the quantity and kind of raiment the plaintiff provided for defendant the evidence is silent. She states, as a conclusion of hers, that it was insufficient, but no facts are stated from which we can form any conclusion of our own as to that. We are unwilling to condemn the plaintiff's conduct in this regard without something more than is disclosed by the evidence before us. There is no evidence that the plaintiff was guilty of such cruel or barbarous treatment of defendant or her children as to endanger the life of either.

It does appear from the testimony of defendant that the plaintiff, on one occasion, when he was "out of sorts," as she expressed it, told her that she did not know she was coming to a poor house, and that she replied that she did not, but that if she had she would have stayed at her own home. He told defendant that her children were "onery," "no count," liars, unworthy of confidence and who "could not earn their salt." The utterances were perhaps personal indignities, but hardly such as to render her condition intolerable. There does not seem to have been any repetition of them when the plaintiff was not "out of sorts." Both parties were somewhat advanced in years and it will not do to say that pevish utterances of either of them, of the kind just referred to, while suffering from some ailment, or not in usual health, afford grounds for separation. Persons who enter the conjugal state must, as has been expressed, "bear and forbear." Every slight exhibition of ill temper or every unpleasant utterance must not be seized upon as a ground for the severance of the marriage tie. Before a party is granted a divorce, one of the statutory grounds therefor should be alleged and very, very satisfactorily established by credible evidence. In the interest of society, courts should not, as they are often asked to do, grant divorces for "trifles as light as air." In this case there is no allegation

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that the plaintiff offered the defendant such indignities as to render her condition intolerable.

It seems to us that the defendant, according to her own evidence, absented herself from the plaintiff without any reasonable cause therefor. It may be well doubted whether the defendant, in her cross-petition has alleged any statutory cause for a divorce, but if she has we do not think the same has been sustained by the evidence .

We are not satisfied with the decree of the trial court in dismissing both petition and cross-petition, and we shall therefore reverse the judgment and remand the cause for rehearing. All concur.

THOMAS J. MEADOWS, Respondent, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Railroads:** KILLING STOCK: COMPLAINT: DAMAGE STATUTES. An amended statement set out in the opinion is held to state a good cause of action under section 4428, Revised Statutes 1889, which is supplementary to section 2611 and gives a cause of action for stock killed where the tracks of a railroad are not fenced but might have been.

2. ——— : ———: SUFFICIENCY OF COMPLAINT. A complaint under section 4428, does not have to state in words that the track might have been fenced but it is sufficient if it alleges facts that show it might have been.

3. **Justices' Courts:** STATEMENT: AMENDMENT ON APPEAL: DEPARTURE: WAIVER. Where a statement is amended in the circuit court on appeal from the justice, and the defendant without objection appears and tries the cause on such statement, he has waived his right to object that such amendment was a departure from the original statement.

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4. **Railroads:** KILLING STOCK: AGREEMENT WITH LAND-OWNER AS TO FENCE: RUNNING WITH THE LAND. **Parol agreements for the arrangement and maintenance of a fence between a railroad and the abutting landowner do not run with the land and can not bind a grantee.**

Appeal from the Ray Circuit Court.—*Hon. E. J. Broaddus*, Judge.

AFFIRMED.

Chas. A. Loomis for appellant.

(1) No action can be maintained under section 2611 or section 2612 for stock that is struck and killed within the corporate limits of any city or town. Edwards v. Railroad, 66 Mo. 567; Cousins v. Railroad, 66 Mo. 572; Elliott v. Railroad, 66 Mo. 683; Rhea v. Railway, 84 Mo. 345; Brandenburg v. Railroad, 44 Mo. App. 244. (2) Both the original petition filed in the justice court, and the amended petition, filed in the circuit court, and also the amended petition after it was finally amended on the trial by striking out the words "the double of" was intended to and did state a cause of action, if it stated any cause of action, under section 2611. R. S. 1889, sec. 2611; Evans v. Railway, 67 Mo. App. 255; Rhea v. Railway, 84 Mo. 345; Geiser v. Railway, 61 Mo. App. 459; Yeager v. Railway, 61 Mo. App. 594; Manz v. Railway, 87 Mo. 278. (3) The same cause of action and no other that was tried before the justice shall be tried before the appellate court on the appeal. Amendments may be made in the circuit court, stating properly the cause of action which was intended to be stated before the justice, but no amendment can be allowed in the circuit court which does not state the same cause of action which was intended to be stated before the justice. Sections 6345 and 6347, Revised Statutes 1889; Evans v. Railway, 67 Mo. App. 255; Gregory v. Railway, 20 Mo. App. 448; Sturges v. Botts, 24 Mo. App. 282. (4) Plaintiff can not bring an action for double damages under

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section 2611, or for single damages under section 2612, and recover under section 4428 or at common law. He can not change his cause of action after he has commenced it, from double damages to single damages. Rhea v. Railway, 84 Mo. 345; Wood v. Railroad, 58 Mo. 109; Edwards v. Railroad, 66 Mo. 567, 572; Luckie v. Railway, 67 Mo. 245; Cary v. Railroad, 60 Mo. 209; Grant v. Railway, 56 Mo. App. 65-67; Sullivan v. Railroad, 72 Mo. 195. (5) Neither the original petition filed in the justice court nor the amended petition filed in the circuit court stated any cause of action under section 4428, Revised Statutes 1889, for the reason: First, that it does not state facts showing that the injury occurred where the company might or could fence, but where it is not compelled to fence. But on the contrary alleged facts showing that the injury happened where the company was compelled by law to fence, under section 2611. Vail v. Railway, 28 Mo. App. 372; Evans v. Railway, 67 Mo. App. 255; Smith v. Railway, 29 Mo. App. 65; Clarkson v. Railway, 84 Mo. 583, 586; Russell v. Railroad, 83 Mo. 507. (6) The court committed error in refusing instructions numbered 3 and 4 asked by defendant. Ells v. Railroad, 48 Mo. 231; Busby v. Railway, 81 Mo. 43; Madison v. Railway, 60 Mo. App. 606, 607, and cases cited; Berry v. Railroad, 65 Mo. 172; Harrington v. Railroad, 71 Mo. 384; Ins. Co. v. Railway, 74 Mo. App. 98.

Lavelock & Kirkpatrick for respondent.

(1) The petition states a cause of action. Revised Statutes, section 4428; Scott v. Railroad, 75 Mo. 136; Wymore v. Railroad, 79 Mo. 249; Radcliffe v. Railroad, 90 Mo. 132, 133; Railroad v. Clark, 121 Mo. 183; Lane v. Railroad, 18 Mo. App. 560, 561; Vanderworker v. Railroad, 51 Mo. App. 169, 170. (2) The filing of the amended petition was authorized. Revised Statutes, sec. 6347; Geiser v. Rail-

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road, 61 Mo. App. 461, 462. Defendant having gone to trial on the amended petition, without objecting thereto on the grounds that it changed the cause of action, thereby waived any such objection. Finkelburg's Appellate Practice, pp. 104, 105; Long v. Talley, 91 Mo. 310; Western v. Flanagan, 120 Mo. 64; Aull v. Railroad, 73 Mo. App. 369. Only questions decided by the trial, to which objections were made and exceptions saved, will be reviewed by appellate courts. Revised Statutes, sec. 2302; Burdoin v. Trenton, 116 Mo. 374; McDonald v. Cash, 45 Mo. App. 81; Distilling Co. v. Lock, 59 Mo. App. 639. This rule obtains as to the amendment of pleading. Hubbard v. Quisenberry, 28 Mo. App. 27; Jones v. Railroad, 59 Mo. App. 142. This is true even though the objection be that the amendment changes the cause of action. Spurlock v. Railroad, 93 Mo. 537; State ex rel. v. Jones, 53 Mo. App. 212; Beard v. Parks, 44 Mo. 244; Fisher v. Railroad, 46 Mo. 304; Burdoin v. Trenton, *supra*; Nall v. Railroad, 97 Mo. 75; Walker v. Owen, 79 Mo. 567, 568; State ex rel. v. Chick, 146 Mo. 661, 662; Querback v. Arnold, 55 Mo. App. 288. (3) A verbal agreement between a landowner and a railroad company that the former will maintain fences and gates on the sides of right of way and relieve the latter from liability for stock injured on the track by reason of defective fences or gates, does not run with the land and is not binding on third parties without notice. Nolon v. Railroad, 23 Mo. App. 356. (4) The evidence sustains the cause of action alleged in the petition. Wymore v. Railroad, 79 Mo. 249; Radcliffe v. Railroad, 90 Mo. 132; Lane v. Railroad, 18 Mo. App. 560, 561; Vanderworker v. Railroad, 51 Mo. App. 169; Woods v. Railroad, 51 Mo. App. 503; Freet v. Railroad, 63 Mo. App. 551, 553.

GILL, J.—Plaintiff sued the defendant before a justice of the peace for running one of its trains over and killing a horse belonging to him at a point where said railroad passes

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through plaintiff's premises, and which are within the corporate limits of the town of Lawson in Ray county.

At the trial the circuit court where the case was taken by appeal, there was little dispute as to the facts. Plaintiff's premises are just within the outer limits of the town of Lawson. His residence is on one side of the defendant's right of way and he has a small pasture on the other side. The right of way has a fence on the two sides, and in order to let plaintiff's stock pass over into the pasture, there was a small gate about five feet wide placed in the right of way fence. This gate had, according to plaintiff's evidence gotten out of repair, had become rotten, hinges broken, etc., and had been in that condition for more than a year prior to the accident. The horse it seems bore against the defective gate, it broke down, and he went upon the railroad track and was killed by a passing train. The plaintiff's tract of land, though within the corporate limits of Lawson, had never been platted, and there were no streets, alleys or other highways passing over or through the same.

Defendant introduced evidence tending to prove that the gate in question was constructed by one Cummins, a former proprietor of the land; that the defendant's road-master attempted to put in a regular farm crossing gate of the usual width and strength, but that Cummins at the time objected and told the road-boss that he wanted nothing but the small gate which he (Cummins) would put in himself and at his own risk and expense. Cummins died in February, 1898, about six months before plaintiff's horse was killed. But it seems that plaintiff (who was Cummins' son-in-law) had prior to that been in possession of the land as a tenant. Whether at the time of the accident plaintiff occupied the property by right of heirship or as tenant of the heirs, does not appear. At any rate it is conceded that he was proprietor, and had been occupying the premises for some time. On the merits of the case the principal contention at the trial was, that

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because of the conduct of Cummins, as above stated, the defendant was relieved of the obligation to maintain the gate — that the right of the plaintiff thereto had been waived.

The case was tried before the court sitting as a jury resulting in a judgment in plaintiff's favor for $140 (the admitted value of the horse), and defendant appealed.

The errors assigned may be treated of under two heads —first as to the sufficiency of the complaint filed before the justice, but which was amended in the circuit court; and second, conceding the complaint to be good, whether under the evidence the plaintiff was entitled to recover—including in the latter point the action of the court in refusing certain instructions asked for by defendant.

Without quoting the statement or complaint filed with the justice at the institution of the suit, I think it should be conceded that it was an attempt to state a case under section 2611 which fixes a liability for double damages for stock killed by a railroad company at a point on its right of way which said statute requires to be fenced. Although the complaint was awkwardly drawn, and in addition to calling for double damages asked also for an attorney's fee, it is yet apparent from the face of the paper that the pleader intended to base his claim on section 2611, and not 2612 or on section 4428 of the general damage law. But when the case got into the circuit court by appeal the plaintiff filed an amended statement which eliminated to a large extent those features which so definitely characterized the complaint as one under section 2611, and as I think made of it a fairly good statement under section 4428. This amended statement—after the formal allegations of defendant's incorporation, etc.—proceeds to allege:

"That on or about the 25th day of July, 1898, this plaintiff was the owner of the following described animal to wit, a horse of the value of one hundred and forty dollars, and that on or about the date above mentioned, the said animal without

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fault of the plaintiff strayed on the railroad track of the defendant in said Polk township and was struck by the engine, train and cars of the defendant while the same were being run and operated by the defendant, its agents and servants, on its said railroad track in Polk township in said Ray county; that the place at which the horse of the plaintiff strayed upon said track was not within the switch limits of any station on said railroad nor at any public or private crossing or street over said railroad; that said horse strayed upon said railroad track at a point where the same passes through inclosed and cultivated fields and premises of which the plaintiff is the proprietor, and at a point where the defendant had failed to maintain at all points on the sides of its right of way a lawful fence sufficient to prevent said animal from straying from the adjoining inclosure onto said track; that said horse did stray from the adjoining inclosure through an opening or defect in the fence of defendant onto its said track where it was killed as aforesaid."

The foregoing comprise substantially all the allegations necessary to charge the defendant under section 4428. This section was intended as a supplementary provision to section 2611. The latter was intended to require railroad companies to erect and maintain fences along their tracks where they pass through the country outside the limits of incorporated towns and cities (except of course where they pass over highways) and in default of which they were to pay double damages for stock killed or injured by reason of such default; while the former (sec. 4428) was intended to give a cause of action in single damages for stock killed or injured along the line of the railroad where the tracks were not fenced but might have been, though not in fact required by section 2611 to be fenced. Hence if stock was run over and killed or injured along the line of the road where the right of way was not inclosed by a lawful fence, the owner might sue and recover double damages if the loss occurred by failure to fence where

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section 2611 required, or might sue and recover single damages under section 4428 whether the failure to fence was at a point required by section 2611 or was at a point not so required but which might lawfully have been fenced. Judge Henry in Radcliffe v. Railway, 90 Mo. loc. cit. 133, thus shows the purpose of section 4428, then called section 2124:

"The words 'may be inclosed' in the proviso mean no more than that the company should not be held under that section, if in fact the road at the point where the accident occurred, was inclosed by a lawful fence. It was not intended to restrict its application to cases of injury occurring at points where the companies are required to fence, but is general, giving the right to sue, under that section, for an injury occurring anywhere on the road, except where it was inclosed by a lawful fence or crossed public highways. When the injury occurs at an unfenced portion of the road which the statute requires the company to fence, the owner of the cattle injured has the option to sue for double damages under the eight hundred and ninth section (now 2611) or to sue under section 2124 (now 4428) of the damage act for single damages."

Defendant's counsel is therefore in error in contending, as he does in his brief, that plaintiff's complaint is defective because "it does not allege that the injury occurred at a point where the defendant railroad company was not compelled by law to fence, but might fence its road." For, as already stated, section 4428, provides for an action not only where the injury occurs at a point required to be fenced, but at any point on the road where the railroad may lawfully fence its track. So then if the complaint allege in direct terms, or state such facts as would clearly imply that the injury occurred at a point on defendant's road which it might have fenced but did not then the petition or statement should in that respect be held good under section 4428. Where the statement alleges facts which show that the defendant might have

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fenced its road at the point where the horse entered upon the track, it is sufficient in that regard. Radcliffe v. Railway, *supra*; Wymore v. Railroad, 79 Mo. 247.

The statement in hand sufficiently charged these facts. It was there alleged that the place where plaintiff's horse strayed upon the track "was not within the switch limits of any station on said railroad nor at any public or private crossing or street over said railroad; that said horse strayed upon said railroad track at a point where the same passes through inclosed and cultivated fields and premises of which the plaintiff is proprietor, and at a point where the defendant had failed to maintain at all points on the sides of its right of way a lawful fence, etc. * * * that said horse did stray from the adjoining inclosure through an opening or defect in the fence of defendant onto its said track where it was killed as aforesaid." If these allegations were true then clearly the road was not inclosed with a lawful fence where it might have been. If the facts were as alleged then there was nothing to prevent defendant from fencing its right of way at the point where the injury happened. In the prayer for relief, it is true, plaintiff asked double damages, but the sufficiency of the statement is not judged by the prayer but by the facts alleged. This prayer however was stricken out at the trial and plaintiff asked only single damages. We hold the complaint or statement contained sufficient allegations to bring the case within the purview of section 4428, on which evidently the cause was tried and determined.

In defendant's brief however it is contended, that if the amended statement filed in the circuit court is to be treated as the statement of a cause of action under section 4428 of the damage act, then it is a departure from the cause of action set out in the complaint filed in the justice's court. It is then insisted that no such amendment could be made as this would be introducing or substituting a cause of action different from that contained in the original complaint, contrary to

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sections 6345, 6347 of the statute, which in effect denies the right of the plaintiff to state by amendment in the circuit court a cause of action different from that alleged in the justice's court. Evans v. Railway, 67 Mo. App. 255. But defendant is in no condition now to make this complaint, since it failed to make timely objection in the circuit court. The record does not show that defendant objected to the filing of the amended statement or that at any time the defendant moved to strike it out. On the other hand defendant went to trial thereon and took its chances on the alleged new cause of action. It thereby waived its right to object in this court. Hubbard v. Quisenberry, 28 Mo. App. 20; Jones v. Railway, 59 Mo. App. 137.

Defendant's counsel is correct in the contention that no action can be maintained under section 2611 for stock killed or injured within the corporate limits of a city or town. If then this suit had been tried on the first statement filed before the justice then clearly under the authorities cited by defendant the plaintiff could not have recovered. But as already stated that complaint was abandoned in the circuit court, and without any objection from defendant the case was litigated on a new and different cause of action—was based on a section allowing a recovery even though the place of injury was within the corporate limits of a town.

The next and last contention is that even though the fence inclosing the defendant's right of way was, by reason of the defective gate, so imperfect as to permit stock to enter onto the railroad, yet, because of the oral agreement had with Cummins, the prior owner and occupant to the effect that he (Cummins) would erect and maintain the small gate at his own risk, plaintiff could not now complain of a defect therein.

If Cummins was party plaintiff to this action then defendants authorities would apply. He (Cummins) would be estopped to make any claim. But there was no evidence, however, to prove that plaintiff had any notice of this so-called

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understanding between Cummins and the railroad company until after plaintiff had gone into possession of the premises, and he then warned defendant's agents that he would not be bound thereby and that he would insist on proper fencing. Under a similar state of facts the supreme court said: "But parol agreements for the removal and discontinuance of a fence on the line of a railroad between the owner of the land and the railroad company does not run with the land and can not bind the grantee." (Citing authorities.) "It would seem, therefore, that a tenant of the landowner who had made such a contract with a railroad would not be bound thereby, unless he had notice of the existence thereof. 4 Ohio St. 424," see, also, Nolon v. Railway, 23 Mo. App. 353. So then in this case, it would seem that whether plaintiff was occupying the premises as tenant or purchaser and grantee of the Cummins heirs, he was not bound by the parol agreement the ancestor made with the railroad company. Said agreement did not run with the land, and defendant's instructions numbered 3 and 4 were correctly refused.

Discovering no reversible error in the record, the judgment must be affirmed. All concur.

CALVIN C. GRIFFIN, Respondent, v. MISSOURI, KANSAS & EASTERN RAILWAY, COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Notice: UNRECORDED DEED: INQUIRY: RECORD: IN PAIS. One having notice of an unrecorded deed does not satisfy the quality of good faith by examining the record but should inquire of his grantor and the reputed grantee.

Appeal from the Boone Circuit Court.—*Hon. J. A. Hockaday,* Judge.

REVERSED AND REMANDED.

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Geo. P. B. Jackson for appellant.

(1) The plaintiff acquired the land from John C. Griffin with notice of the grant of right of way by the latter to the Central Missouri Railway Co., and therefore was not entitled to recover on the first and second counts. It is not required that he should have been informed of all the details, or have had positive information. "Anything which will put a prudent man upon inquiry is notice." Ins. Co. v. Smith, 117 Mo. 261, 292 and cases there cited; Maupin v. Emmons, 47 Mo. 304. (2) The deed conveying the right of way was exhibited to plaintiff before he had finished paying for the land. To constitute one an innocent purchaser he must show that he paid the purchase money without notice of any adverse claim. Halsa v. Halsa, 8 Mo. 303; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beckman, 1 Johns. Ch. 288; Paul v. Fulton, 25 Mo. 156; Arnholt v. Hartwig, 73 Mo. 485; Digby v. Jones, 67 Mo. 104. (3) The burden of establishing that one is an innocent purchaser is on him who claims to be such. Halsa v. Halsa, 8 Mo. 303; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beckman, 1 Johns. Ch. 288; Paul v. Fulton, 25 Mo. 156; Arnholt v. Hartwig, 73 Mo. 485; Digby v. Jones, 67 Mo. 104; Moss v. Railroad, 85 Mo. 86; McCord v. Railroad, 21 Mo. App. 92. The court therefore erred in refusing the defendant's peremptory instruction.

Odon Guitar and *W. H. Truitt, Jr.*, for respondent.

(1) Having paid $427 on the land and secured the balance by deed of trust, before receiving notice of J. C. Griffin's unrecorded grant of right of way respondent is "an innocent purchaser" and unaffected thereby. Conrad v. Fisher, 37 Mo. App. 352; Aubuchon v. Bender, 44 Mo. 560; Chouteau's Ex'r v. Burlando, 20 Mo. 482; Paul v. Fulton, 25 Mo. 156; Digby v. Jones, 67 Mo. 107; Youngblood, Adm'r v.

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Vastine, 46 Mo. 239. (2) It is not necessary that the entire purchase money should have been paid when notice comes to the purchaser to constitute him "innocent." The authorities cited do not support appellant's contention, but the contrary.

ELLISON, J.—This case was argued and submitted with that of Edwards against this defendant and in its principal points is governed by that case, decided at this term.

In this case plaintiff's own testimony shows he had ample information to put him on inquiry as to a deed prior to his own. He bought the land from John C. Griffin, his nephew, and testified that at the time of his purchase he "understood that his nephew had conveyed to the railway," "but I don't know that he had told me he had." He distinctly stated, however, that he had heard of the former conveyance from the other parties.

But plaintiff seeks to avoid this on the ground, as stated in his brief, that he did go upon his inquiry and did not learn anything. The only inquiry he made was to examine the deed records and the deed being an unrecorded one he, of course, did not find it. It is altogether unreasonable to say that when one is put upon inquiry for an unrecorded deed that an examination at a place where it is known it can not be found would satisfy the quality of good faith which is required by the law. Wade on Notice, sec. 270. He should have inquired of his grantor, and if that was not satisfactory in result, he should have inquired of the reputed grantee. There being nothing disclosed in the record why he could not conveniently do this. When one has sufficient knowledge of the existence of a prior conveyance or title he can not stop short at an examination of the records when additional means of information are at hand.

Judgment is reversed and the cause remanded. All concur.

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P. F. EDWARDS, Respondent, v. MISSOURI, KANSAS & EASTERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Notice:** UNRECORDED DEED: INQUIRY. One having such knowledge or information as is sufficient to put a man of ordinary prudence on inquiry is to be regarded as having actual notice.

2. ——: ——: PAYMENT OF PURCHASE MONEY: ACTION. One who after receiving notice of an unrecorded deed pays sufficient of the purchase price of land to cover his damages can not maintain an action against the grantee in such unrecorded deed for damages resulting from his entry thereunder.

3. ——: TENDENCY OF EVIDENCE: POSSESSION. There was evidence offered by defendant which, taken in connection with his possession, tended to show knowledge.

4. **Railroads:** FORFEITURE OF CHARTER: BURDEN OF PROOF. The burden of proof to show that a railroad charter has been forfeited by failure to begin construction, etc., is upon the party asserting it. In the absence of such evidence, the court can not assume the forfeiture.

5. ——: APPROPRIATION OF RIGHT OF WAY: DAMAGES FOR FLOODING. Where a railroad acquires the title to the right of way from defendant's grantor he can not recover for the appropriation of the land or damages to the farm resulting therefrom, but he may recover for the unskillful construction resulting in the overflowing of the land.

6. **Notice:** SUBSEQUENT DEED: INNOCENT PURCHASER: BURDEN OF PROOF. A claimant under a subsequent deed invalid unless he is innocent, has the burden of proof to show his innocence where the other party does not assume such burden in its pleading.

Appeal from the Boone Circuit Court.—*Hon. J. A. Hockaday* Judge.

REVERSED AND REMANDED.

Geo. P. B. Jackson for appellant.

(1) The plaintiff acquired the land from Jas. T. McBaine with notice of the grant of right of way by the latter to

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the Central Missouri Railway Co., and therefore was not entitled to recover on the first and second counts. It is not required that he should have been informed of all the details, or have had positive information—"anything which will put a prudent man upon inquiry is notice." Ins. Co. v. Smith, 117 Mo. 261-292, and cases there cited; Maupin v. Emmons, 47 Mo. 304. (2) The deed conveying the right of way was exhibited to plaintiff before he had finished paying for the land. To constitute one an innocent purchaser he must show that he paid the purchase money without notice of any adverse claim. Halsa v. Halsa, 8 Mo. 303; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beckman, 1 Johns. Ch. 288; Paul v. Fulton, 25 Mo. 156; Arnholt v. Hartwig, 73 Mo. 485; Digby v. Jones, 67 Mo. 104. The burden of establishing that one is an innocent purchaser is on him who claims to be such. (3) The grant of a right of way for a railroad relieves the owner of the easement from all liability for damages either on account of the land actually occupied, or of any injury or inconvenience to the land through which the railroad passes. 3 Elliott on Railroads, sec. 937; 1 Rorer on Railroads, 313; R. S. 1889, sec. 2734; Clark v. Railroad, 36 Mo. 202-224; Munkers v. Railroad, 60 Mo. 334; Benson v. Railroad, 78 Mo. 504-513; Abbott v. Railroad, 83 Mo. 271; Jones v. Railroad, 84 Mo. 151; Moss v. Railroad, 85 Mo. 86; McCord v. Railroad, 21 Mo. App. 92. The court therefore erred in refusing the defendant's peremptory instructions. (4) The plaintiff testified that the overflow complained of was occasioned by surface water resulting from excessive rainfall. The defendant was not liable for such damage. McCormick v. Railroad, 57 Mo. 433; Abbott v. Railroad, 83 Mo. 271-280. Waters overflowing the banks of a stream are to be regarded as surface water. Abbott v. Railroad, 83 Mo. 280; Shane v. Railroad, 71 Mo. 248. (5) In the absence of negligent construction, defendant is not liable for overflow caused by the location of its railroad. Cases cited under point 3. The plaintiff was there-

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fore not entitled to recover on the third and fifth counts, and the court erred in its ruling upon the instructions relating to those counts.

Odon Guitar and *W. H. Truitt, Jr.* for respondent.

(1) The offer to show by "general notoriety" that J. T. McBaine had conveyed the right of way was properly excluded. All the world except plaintiff, may have known the fact, yet their knowledge would amount to nothing unless brought home to him. It must be conceded that our courts have gone a good ways in releasing the "stern and essential" requirements of our registry laws, and the policy of such relaxation may be greatly questioned. (2) When the lawmakers framed our statute providing that no such "instrument in writing shall be valid except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record," they hardly dreamed that within a few years, it would be gravely contended by learned counsel in our court of last resort that "general notoriety"was sufficient to impart actual notice of the existence of a deed affecting real estate; and that in a case where the party relying upon the deed, and those under whom it claims, have deliberately withheld the deed from record for more than seven years after its execution; and where the purchaser claiming title adverse to said deed, before consummating his purchase "in the multitude of caution" went to the records and examined them to ascertain if there was any deed or encumbrance in existence affecting the title to the land he was proposing to purchase. If it can be held in such case the purchaser is not "innocent" then the law in question should be repealed without delay as an instrument of fraud, rather than a shield to the innocent. Such is not the law in letter or in spirit. (3) Concerning the claim that the corporate existence and powers of the Central Missouri Railway Company had terminated before it con-

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veyed the right of way to its successors as held by respondent. See R. S. 1889, sec. 2664; Ford v. Railroad, 52 Mo. App. 439, 451, 452, 453, and particularly opinion on motion for rehearing. The Matter of the B. W. & R'y Co., 72 N. Y. 245; 75 N. Y. 335; Transit Co. v. Brooklyn, 78 N. Y. 524; Bradley v. Reppell, 133 Mo. 545-552; which apply as well in the Griffin case.

ELLISON, J.—This is an action for damages caused by the construction of defendant's railway over plaintiff's land. The petition was in five counts and the judgment was for plaintiff on all but the fourth, in the aggregate sum of $1,600.

The first count was for an entry and appropriation of a strip of land one hundred feet wide through plaintiff's farm without a deed or other permission. The second was damages to the remainder of the farm by dividing in parts, etc. The third was for such careless and unskillful construction as to cause plaintiff's land to overflow. The fourth was for damages occasioned in 1893 by destruction of eight acres of wheat growing on said lands and destroyed by overflow caused by the construction of defendant's road. The fifth was for the destruction in 1894 of forty-five acres of timothy and clover growing on plaintiff's land by an overflow caused by the careless and unskillful construction of defendant's roadbed.

It appears that defendant is the successor of the Central Missouri Railway Company. That the land in controversy was formerly owned by one McBaine and that he conveyed the right of way through said land one hundred feet wide to the latter company which conveyed to defendant. That afterwards, plaintiff purchased the lands of McBaine's executors and had his deed recorded. That the deed to the Central Railway Company was not recorded until some time after plaintiff's purchase and he had no actual notice thereof, though defendant claims he had such knowledge as was sufficient to put a man of ordinary prudence on inquiry and that he is in

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consequence to be charged with actual notice of the unrecorded deed. It further appears that plaintiff did not pay the full purchase price at the time of his purchase and that while yet owing $1,000 of such purchase money he became actually aware of the unrecorded deed.

The court gave instructions for plaintiff which declared that his title was better than that conveyed by the unrecorded deed and that such unrecorded deed was no defense unless plaintiff had actual notice thereof at the time of his purchase. It was error to so instruct; for if plaintiff had such knowledge and information as was sufficient to put a man of ordinary prudence on inquiry, he is to be regarded as having actual notice. This is the construction given to section 2420 of the statute. Maupin v. Emmons, 47 Mo. 304; Meier v. Blume, 80 Mo. 179; Jennings v. Todd, 118 Mo. 296; Bank v. Frame, 112 Mo. 502; Eck v. Hatcher, 58 Mo. 235.

It was also error to give such instruction since it appears that when plaintiff did become possessed of actual notice in fact of the existence of the unrecorded deed he had in his hands $1,000 of the purchase price of the land and this was more than he claims the strip in controversy was worth. He can not claim to be an innocent purchaser. Halsa v. Halsa, 8 Mo. 303; Wormley v. Wormley, 8 Wheat. 421; Frost v. Beckman, 1 Johns. Ch. 288; Paul v. Fulton, 25 Mo. 156; Arnholt v. Hartwig, 73 Mo. 485; Digby v. Jones, 67 Mo. 104. Having the means, it was his duty to protect himself.

It is suggested that there was no evidence that plaintiff had information or knowledge sufficient to put him on inquiry. Defendant however offered evidence, some of which was excluded, the tendency of which, connected with other facts (among them possession of the strip) was to show such knowledge. Musick v. Barney, 49 Mo. 460.

But plaintiff contends that the Central Missouri Railway Company had ceased to be a corporation at the date of its deed

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to the defendant company. The ground of this contention is that such company did not begin the construction of its road within two years after its organization, and did not within one year thereafter expend ten per cent of its capital as required by section 2664, Revised Statutes 1889. There was no evidence as to this, and in our opinion in order to destroy the effect of defendant's title to the right of way plaintiff should have made proof of those facts. In the absence of evidence we can not assume the charter was forfeited and the corporate existence ceased by failure to comply with the statute. The burden was on plaintiff to show this.

If under the views we have expressed it develops on a retrial that defendant has acquired title to the right of way, plaintiff can not recover for the appropriation of the land, or for dividing it as prayed in the first and second counts; yet he would be entitled to recover damages which may have resulted to him from the careless, negligent or unskillful construction of the road whereby the lands were overflowed. 3 Elliott on Railroads, sec. 937; Clark v. Railway, 36 Mo. 202, 224; Abbott v. Railway, 83 Mo. 272; Moss v. Railway, 85 Mo. 86.

A question is made here as to where the burden of proof was on the question of plaintiff's being an innocent purchaser without notice of the prior unrecorded deed. Ordinarily the burden would be on the party whose case depends on his innocence and lack of notice. Here the plaintiff's claim of title being by a subsequent deed is invalid unless he can establish that he was an innocent purchaser (Halsa v. Halsa, 8 Mo. 304), unless he had been relieved of the burden by defendant assuming it by answer. And whether he has or not becomes unimportant in view of the practical concession that he was aware of the prior deed before paying the balance of purchase price.

It results from the foregoing that the judgment must be reversed and the cause remanded. All concur.

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JAMES H. REED, Adm'r, etc., Appellant, v. THOMAS H. CARROLL, Respondent.

Kansas City Court of Appeals, December 4, 1899.

1. **Gifts**: SOUND MIND: EVIDENCE. The evidence in this case fails to show that the donor of a certain check was of feeble and unsound mind, although he was crippled, aged and physically enfeebled.
2. ———: FIDUCIARY RELATIONS: PRESUMPTION: PRINCIPAL AND AGENT. Where a fiduciary relation exists between the donor and donee, the law scrutinizes with jealousy a gift from the former to the latter and such transaction is presumptively void and the burden is on the donee to show its absolute fairness both at law and in equity; and in transactions between principal and agent this rule applies in this state.
3. ———: UNDUE INFLUENCE: EVIDENCE. Evidence attending the giving of a check from a principal to his agent is reviewed and the transaction is found to be free from the taint of covinous influence and the presumption of undue influence is fully rebutted and overcome.

Appeal from the Boone Circuit Court.—*Hon. J. A. Hockaday*, Judge.

AFFIRMED.

C. B. Sebastian, *Webster Gordon* and *W. M. Williams* for appellant.

(1) An administrator may recover money or property, which his intestate has been induced through fraud or undue influence to give away. Hall v. Knappenberger, 97 Mo. 509; Teegarden v. Lewis, 35 N. E. Rep. 25. (2) It is not necessary for plaintiff to show that John Carlisle was an imbecile, or that he was unable to understand what he was doing. Hall, Adm'r, v. Knappenberger, 97 Mo. 509; Teegarden v. Lewis, 33 N. E. Rep. 763; Ikerd v. Beavers, 7 N. E. Rep. (Ind.) 326. (3) The law presumes that a gift made by an old and feeble

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man to a party occupying a relation of trust and confidence towards him was obtained by undue influence. The burden is upon the donee to rebut this presumption. Cadwallader v. West, 48 Mo. 483; Yosti v. Laughran, 49 Mo. 594; Martin v. Baker, 135 Mo. 495. (4) The court below, under the evidence, should have declared the gift to defendant void and required him to restore to the estate the sum so obtained by him.

North T. Gentry and *Wellington Gordon* for respondent.

(1) If a person understands the nature of the business in which he is engaged and the effect of what he is doing, his acts are valid, and this is true though the mind of such person may be impaired by age and disease. Cutler v. Zollinger, 117 Mo. 101; 1 Parsons on Contracts [7 Ed.], 383; Bispham on Equity [4 Ed.], 291; Kerr on Fraud and Mistake, 145. (2) As to the soundness of the mind of Mr. Carlisle, we do not think this court can hesitate for one moment in saying that his mind was not only good, but unusually strong. (3) Plaintiff then sets up the plea that Mr. Carlisle was over-persuaded and unduly influenced. But again plaintiff relies on his imagination; and we are left to (?) Undue influence, like fraud, can not be presumed; it must always be proved by good, reliable and substantial evidence. Doherty v. Gilmore, 136 Mo. 414; Wait on Fraud. Conv. [2 Ed.], sec. 5; McFadin v. Catron, 138 Mo. 219. Even admitting (which we do not) that defendant did have an influence over Mr. Carlisle, there is no evidence that he exercised such influence. "It is not the existence, but the exertion of that improper influence which invalidates the transaction." Sunderland v. Hood, 84 Mo. 297; Brinkman v. Rueggesick, 71 Mo. 556; Doherty v. Noble, 138 Mo. 32; McKinney v. Hensley, 74 Mo. 332; Jackson v. Hardin, 83 Mo. 185.

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SMITH, P. J.—In the year 1895 John Carlisle departed this life, childless but testate. Subsequently, an action was begun by persons interested in the probate of his will to contest the validity thereof; and pending the contest the plaintiff, Reed, was appointed administrator of the testator's estate.

In 1897 the plaintiff brought this suit against defendant, the object of which was to set aside a gift of one thousand dollars made by the testator to the defendant, and to recover judgment against the latter therefor, etc. The petition alleged, amongst other things:

"On the 4th day of October, 1894, the defendant did fraudulently induce the said John Carlisle to pay and deliver to him one thousand dollars in cash belonging to said Carlisle, and that the said John Carlisle, deceased, was at that time nearly ninety years of age, infirm of body, and weak of mind, and was easily influenced and controlled; that he was living with defendant's family, and that defendant was his confidential agent for the transaction of all his business, and that defendant by virtue of his position as the confidential agent of the said Carlisle, and in consequence of his childishness and by undue persuasion did obtain from him the said one thousand dollars, without any consideration therefor, as a gift." This allegation was put in issue by the denial of the answer.

It appears that the testator was an illiterate man. He could neither read nor write. Notwithstanding this disability he had accumulated an estate valued at from twenty-five to thirty thousand dollars. He had been twice married. The death of his last wife preceded his own by only about nine months. After her death he quit keeping house and resided with defendant from that time until his death. The defendant's wife was the niece of his first wife. It appears that the testator at this time was somewhere between eighty and ninety years old. He was suffering from an old dislocation of his hip, and was afflicted with a running sore on one of his legs and with eczema. He could not get about without difficulty.

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Physically, he was rather helpless. He required considerable nursing and attention. It is not disputed but that the defendant and his family were at all times kind and attentive to him while he lived with them.

The defendant owed him a note which was secured by deed of trust on the farm on which he then resided. The amount then due thereon, according to the testimony of the plaintiff's witnesses, was about three thousand dollars; and according to that of defendant's, it was only about three hundred dollars. The testator, after taking up his residence with defendant, executed and delivered to him a release of said deed of trust. A contract in writing was also entered into between deceased and the defendant, whereby the latter, in consideration of said release, bound himself to support the former during the remainder of his life.

Two or three months after the deceased went to reside with the defendant, he discharged the agent whom he had formerly entrusted with his business. He then employed Mr. Gentry to write his will, in which defendant was named as executor thereof; and also a contract, by which, in consideration of five dollars, the defendant was relieved from his obligation theretofore entered into for the support of the testator during his life. Twelve days later he executed a power of attorney to defendant, under which the latter was authorized:

"For me and in my name, place and stead to grant, bargain and sell, convey and confirm to whomsoever he pleases, any and all real estate owned by me in Benton county, Arkansas, and in Boone county, Missouri, for such price and on such terms and to such person or persons as he may think best, also power and authority is given to said Carroll to collect and receive and receipt for me and in my name, place and stead, any and all notes and accounts, mortgages and deeds of trust due me now or hereafter may become due or owing to me, etc. In less than a month after this, the testator gave the defendant

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a check on the bank where he had his money deposited "for all the money I have in your bank." This check was presented and paid to defendant, and the money so drawn was placed to the credit of T. H. Carroll & Co. The defendant after receiving the power of attorney took into his possession all the property, money and choses in action of the testator. He seems from thenceforth to have acted as the *alter ego* of the testator.

On October 4, 1894, the defendant, under the name of T. H. Carroll & Co., signed a check in his own favor for one thousand dollars on the bank in which he had the funds of the testator deposited. It seems that this check was drawn by Dr. Hulen, the physician of the testator at the latter's instance and while the defendant was not present. It was, however, handed to defendant by the testator, who signed it, as already stated, and drew the money thereon. About ten days after this, the testator died. Defendant presented for allowance against his estate an account for all the services of every kind which he had rendered him during his lifetime, claiming therefor some fifteen hundred dollars, of which five hundred dollars was allowed and paid to him by the plaintiff herein.

It is not denied that the testator was much enfeebled by age and disease at the time the several transactions took place, to which allusion has been made by us. It can not be pretended that the check in dispute was given by the testator to defendant to discharge any indebtedness of the former to the latter for services rendered. Any inference of this kind would be negatived by the conduct of the defendant in procuring the allowance and payment of his account for such service. The delivery of the check was but a gift; and nothing more nor less. The amount of the gift was considerable and at the time of its bestowal the defendant occupied a fiduciary relation to the testator; and the question now is, can it be upheld?

The testimony adduced by plaintiff tends to prove that the mind and body of the testator were in an alike enfeebled

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condition, and that he thought and spoke as a child. A great cloud of witnesses for the defendant, some of whom had been acquainted with the testator since he came to the state in 1838, testified that his mind was unimpaired, notwithstanding his great age; that he possessed an unbending will which was difficult to influence. Two of these witnesses were physicians who had attended him in his illness at different times and their concurrent testimony was to the effect that the vigor of his mind had not been impaired. The complicated and various business interests which he had successfully conducted, both within and without this state, very conclusively demonstrated his mental capacity. His judgment and discrimination seems to have been excellent. He bought and sold real and personal property; managed a stock farm; loaned money on real and personal security; attended in person to much of his business, which extended to two states; carried on a business correspondence with one or more agents in another state. In fact, up to the time of the death of his second wife he seems to have been a very active, painstaking and successful business man—and it nowhere appears that after his wife's death that he was less capable of managing his own business than he had been for some years prior to that event. The bodily infirmities with which he suffered, after he came to live with defendant, were chronic and of many years duration. The overwhelming preponderance of the evidence was to the effect that notwithstanding his physical ailments that his intellectual vigor remained unimpaired. In the face of this, how can we conclude that his mind was weakened by disease? This inference finds no support either in the opinion of his neighbors, acquaintances and friends, who gave their testimony, or in the history of his business life. Though his body was weak his mind maintained its wonted vigor. Some of the old trees of the forest decay first in the top, and others in the trunk—and this case was of the latter kind. Although at the time the transaction in question took place the testator, it seems, was

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far advanced in years, a cripple and afflicted with a sore on one of his legs, and a cutaneous disease, yet, with all this, his mind was clear and his memory good. We must conclude from the great weight of the testimony that his mind was not weak and enfeebled.

In those cases where the confidential relation exists, as between parent and child; guardian and ward; principal and agent; attorney and client; patient and physician; trustee and beneficiary, and the like, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void which, between other parties, would be open to no exception. The rule in regard to the bestowment of gifts and donations where a trust or confidence exists between the parties, is well settled in this state. It has been declared that, where an old and feeble man, whose mind is weakened by disease, bestows a gift, where the relation of trust or confidence exists, it is presumptively void—and the burden is upon the donee to rebut this by showing the absolute fairness and validity of the gift, and that it is entirely free from the taint of undue influence. This sound and wholesome doctrine applies as well to suits of law as to proceedings in equity, and is as broad in its scope as the existence of the confidential and fiduciary relation. The rule stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another. Hall v. Knappenberger, 97 Mo. 509; Cadwallader v. West, 48 Mo. 483; Gay v. Gillilan, 92 Mo. 250; Street v. Goss, 62 Mo. 226; Yosti v. Laughran, 49 Mo. 594; Dunscomb v. Richards, 46 Mich. 166, and authorities there cited.

It would seem, according to the cases just cited, that in this state the relation of principal and agent is embraced in the same category as guardian and ward; physician and patient; parent and child; attorney and client, and trustee and beneficiary; and that the transactions between them are subject to the same rules of equity. Though in other jurisdic-

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tions it is different, where it is held that in cases of gifts by the principal to an agent that no presumption exists against the gift. Ralston v. Turpin, 25 Fed. Rep. 7; Pressley v. Kemp, 16 S. C. 334. In a note to the first of the last cases cited it is said that confidential relations are divided into two groups. The first of which imply control over the will of another, such as guardian and ward and trustee and beneficiary, in which cases dealings between the parties are subject to an adverse presumption because of the opportunities and temptations which the relationship affords for the improper exercise of the dominion thus acquired. The second group comprises relations of trust and confidence, such as principal and agent, and partners, in which cases dealings between the parties are closely scrutinized because of the opportunities and temptation which the relation affords for the abuse of the trust and confidence. In the latter, confidence alone exists while dominion is not implied. In cases of gift by a person sustaining any relation in which dominion is implied there is a presumption of law against validity. In case of a gift by a principal to an agent the *onus* is on the party assailing it. Uhlich v. Muhlke, 61 Ill. 499.

But, as we understand it, this distinction has not been recognized in this state, and therefore we are constrained to hold that, though the relation between the testator and defendant was only that of principal and agent, the gift made by the former to the latter is presumtiously void and can not be upheld by us, unless that presumption is repelled by evidence showing that it was freely and voluntarily made without the semblance of a suspicion of covinous influence. Has he, by his evidence, cleared the transaction of the imputation of the undue influence which the law otherwise conclusively presumes?

It may be that the mind of the testator was more or less enfeebled by age and disease, yet we can not think, as already stated, that this went to the extent of mental imbecility or

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unsoundness. If the testator was, at the time of the bestowal of the gift, of sound mind and clearly understood the nature of the transaction and exercised a free will under no restraint or undue influence, then the gift must be upheld. The evidence, as already stated, discloses that the testator was worth from twenty to thirty thousand dollars. He had no wife, child or other lineal descendent. His next of kin were nephews and nieces. Some of these were *persona non grata.* He had voluntarily chosen to reside with the defendant, whose wife was the kindred, by blood, of his first wife, but not to him. In the family of defendant he found a comfortable home. Here, friendly hands tenderly cared for all his physical wants and necessities; here, the helpless old cripple found those upon whom he could lean for support. The whims and caprices of one suffering from various ailments were humored. He was furnished meat, drink, medicine and nursing when required. A son or a daughter could not have been more attentive to his wants than the defendant and his wife were. With them this old man found sympathy and society not afforded by his own home, after the death of his wife. The defendant cared for his business interests with signal fidelity. There was the evidence that a warm friendship had long existed between deceased and the defendant and his family. It is not surprising that the testator should, under these circumstances, bestow on the defendant the gift in question out of the abundance which he had. It was an act no doubt prompted by the nobler impulses of a grateful heart. There is nothing perceived in the transaction tainting it with suspicion. It was not conducted in secret. The medical adviser of the deceased filled out this check, with five others to his relatives, at the request of the deceased.

The drawing and delivery of these checks seems to have been the unbiased spontaneous act of the testator's own mind, acting voluntarily and without solicitation of the defendant.

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A gift so made under these circumstances does not seem to us to have been in the least unreasonable.

But it is contended that the defendant had previously rescinded an obligation of the defendant to support him during his natural life and that coupling that transaction with the gift of the check gives rise to the suspicion of undue influence. The evidence discloses that the testator had received considerable sums of money from his first wife which had augmented his fortune. It appears that the deceased frequently referred to this in his conversations with the kinsmen of his first wife and in doing so he always assured them that at his death he would make a liberal return of it to them. It further appears from the evidence that the testator's reason for releasing the deed of trust and the cancellation of the contract for support was to give the defendant's wife, the niece of the testator's first wife, something. This was doubtless in furtherance of the previously expressed intention on the part of testator for the reasons already stated to give part of his property to those of kin to his first wife.

Nor does the fact that defendant presented an account against the estate of testator for services rendered, satisfy us that the gift of the check was induced by the covinous influence of the defendant. It may be, and probably is true, that if this suit had not been brought that the defendant would never have presented the account referred to against the estate of the testator. He probably thought that if he was deprived of the gift that he would demand pay for the services he had rendered the testator. If the check was a gift, as we think was the case, its acceptance was no bar to the defendant's right to recover for the services rendered by him to the testator. It does not appear that the check was given in discharge of any indebtedness of the testator to defendant. There is no connection between the gift and the account. They are independent of each other. Taking all the evidence and natural inferences

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together, we think the presumption of undue influence has been fully rebutted and overcome.

Nothing is perceived in the record before us to justify a disturbance of the decree of the circuit court, which accordingly will be affirmed. All concur.

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CHRISTOPHER NOLL, Respondent, v. JOHN B. MORGAN, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Taxes: ASSESSMENT: APPEAL: NOTICE: GLASGOW.** Where the taxpayer and assessor are content with the former's list and there is no appeal, the board of revision and appeals has under the charter and ordinances of the city of Glasgow no authority in any way to change such list —especially so without giving notice of its sitting.

2. ———: CONSTRUCTION OF REVENUE LAWS. Laws of assessment and collection of the revenue should be construed with reasonable strictness and when power is conferred upon a particular tribunal to perform a specified act such enactment is mandatory in its nature and must be strictly observed, and a departure will be fatal.

3. ———: INVALID ASSESSMENT: LEVY: INJUNCTION: SOLVENCY. Where the collector seizes the property of a taxpayer on his refusal to pay an invalid assessment and is threatening to sell the same, such collector will be restrained by injunction and his solvency or insolvency is immaterial.

Appeal from the Howard Circuit Court.—*Hon. J. A. Hockaday*, Judge.

AFFIRMED.

E. W. Henry for appellant.

(1) Where injunction proceedings have been brought to prevent the sale of personal property by an officer for taxes,

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the time of the sale of the property should be alleged in the petition, for the property may be sold or a delivery bond forfeitured before the petition is filed or a temporary injunction is served; and the petition should show on its face that such is not the case, and, to entitle the respondent to a final or perpetual injunction against appellant, the respondent must allege in his bill of complaint facts showing his right to the relief prayed for against appellant. He must show a clear right to a perpetual injunction. 10 Am. and Eng. Ency. of Law, [1 Ed.], p. 784, section 3. (2) The respondent seems to base his ground of relief on the alleged fact that the appellant is insolvent and can not answer in damages for his illegal action. The act of the general assembly of the state of Missouri, incorporating the city of Glasgow, approved February 27, 1845, was declared by section 35 thereof to be a public act, and the appellant, John B. Morgan, is not collector, as alleged, but is constable and *ex officio* collector of the city of Glasgow. Section 1, chapter 10, and section 4, chapter 25, of the Revised Ordinances of the city of Glasgow, 1892, now in force, and appellant is required by section 21 of said act of the general assembly of Missouri, and section 2373 of the Revised Statutes of Missouri 1889, and section 2, chapter 22, of said ordinances to give bond; hence the respondent in order to base his relief on the ground of insolvency, should have alleged in his petition that the appellant is not required by law to give bond or that the sureties on his bond are insolvent. The respondent has an adequate remedy at law. State to use v. Shacklett, 37 Mo. 281; Bank v. Meredith, 44 Mo. 500; Warrensburg v. Miller, 77 Mo. 57. (3) In the early decisions of Sayre v. Tompkins, 23 Mo. 445, and Barron v. Davis, 46 Mo. 394, and Deane v. Todd, 22 Mo. 93, and McPike v. Pew, 48 Mo. 525, it was decided that the sale of personal property for taxes could not be enjoined, but the rule in this doctrine has been somewhat relaxed and our courts now only restrain the sale of personal property for taxes levied upon property not the subject

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of taxation. Valle v. Zeigler, 84 Mo. 214, or when the tax is levied without authority. Railway v. Apperson, 97 Mo. 301-307, or if the tax exceeds the amount limited by the constitution. Arnold v. Hawkins, 95 Mo. 573. And the respondent's petition does not state facts sufficient for equitable relief because he does not allege that the tax levied was unconstitutional, or levied without authority, or that the respondent did not have the property that represented the amount of the assessment. 10 Am. and Eng. Ency. of Law, [1 Ed.] p. 857, sec. 26b.

Shackelford with *Caples* for respondent.

(1) From a careful reading of the petition it is clear that the tax which it was proposed to collect was attempted to be levied without any authority whatever. Railroad v. Apperson, 97 Mo. 301, is conclusive as to this point. (2) That injunction is the proper remedy in such cases, is expressly decided in Overall v. Ruenzi, 67 Mo. 203, which has never been overruled. See, also, Valle v. Zeigler, 84 Mo. 214. Even under the old rule in chancery that prohibited injunction where there was an adequate remedy at law, it was expressly stated that the rule did not hold good where the collector was insolvent. See State v. County Court, 51 Mo. 350, (this rule is referred to on page 378), where no reference is made to bond of collector. (3) The plaintiff had a right to suppose the assessment against him would stand as made, as no complaint or objection was made by the assessor when the list was delivered, and no appeal was made by the assessor to the board of revision and appeal. See Coal Mining Co. v. Neptune, 19 Mo. App. 438; Relfe v. Ins. Co., 11 Mo. App. 374, both of which are cited with approval in State v. Spencer, 114 Mo. 574. (4) The only other point raised is that plaintiff had an adequate remedy at law. Let us see what that remedy was: It could not be taken in replevin, because the plaintiff would

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have to make affidavit that the same has not been seized under any process, execution or attachment against the property of plaintiff. See Article 5, Replevin, sec. 6169, Revised Statutes 1889. The only other remedy would be a suit in trespass against John B. Morgan, who is alleged to be insolvent. This allegation of insolvency makes a *prima facie* case, and it is not necessary to go further and anticipate the defense and negative the fact that the collector had given bond, or the solvency of the bondsmen. State v. County Court, *supra* (page 378); Hopkins v. Lovell, 47 Mo. 102; Bailey v. Wade, 24 Mo. App. 186. Aside from this, the plaintiff alleges that Morgan, acting as collector, seized the property of the plaintiff. The appellant, however, has saved the respondent from the force of his objection by expressly showing that in fact the officer was not required, either by the charter of the city or any ordinance, to give any bond, and we refer to the charter and ordinances mentioned in appellant's brief to establish this fact. Section 2373, of the Revised Statutes, noted in appellant's brief, has no application to municipal officers.

SMITH, P. J.—The plaintiff is a tax paying citizen of the city of Glasgow—a city which was incorporated under a special act of the legislature of this state in the year 1845. The defendant is the collector of said city.

The petition, *inter alia,* alleges that in the year 1898 the plaintiff, in compliance with the provisions of section three of chapter 2 of an ordinance of said city, approved December 21, 1892, delivered to the assessor of said city a list of his personal property, duly subscribed and sworn to, amounting to $3,222, which was received by said assessor and duly recorded as the true assessment of his property, and that said assessor returned his assessment book to the mayor and board of councilmen of said city and made no change or report to the said board of councilmen, sitting as a board of appeals, that plaintiff was delinquent or had omitted any part of his property from the

list thereof delivered to the said assessor, and that said assessor did not note any delinquency on his record of the assessment for taxation for said year; that under section five of said ordinance it was made the duty of the mayor of said city, on the completion of the assessment list, to order the secretary of the board of councilmen to give ten days notice of the time and place of the meeting of the board of councilmen, sitting as a board of revision and appeals, by written or printed handbills posted in a public place in each ward of the city; that the mayor of said city failed to make such order, but at a meeting of the mayor and board of councilmen held on July 5, 1898, the clerk was directed to give notice that the board of councilmen would sit as a board of appeals on the eighteenth day of July, 1898; that the secretary of the board of councilmen was not directed to give notice that said board of councilmen would sit as a board of revision and appeals as required by the provisions of said section five; that there was no record in the secretary's book showing that the said order of the board of councilmen, directing the publication of said notice, was ever executed by the said secretary, or that the meeting of said board of councilmen was ever held; that plaintiff had no notice whatever that said assessor had made a report to the board of revision and appeals that he was delinquent and had not given a correct list of his property or that he had omitted any part thereof from the list given by him to said assessor; that the assessor made no such report and that there was nothing to appeal from; that the plaintiff rested, satisfied with his assessment as made by the assessor; that the only record that there was ever a meeting of the board of revision and appeals is a certificate at the end of the assessor's book made and signed by the mayor, long after the tax book had passed into the hands of the said collector and after the said collector had seized the property of plaintiff; that in said tax book, following the certified return of the assessor, was a list of the names of certain persons and the amounts raised, in which list is in-

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cluded the name of plaintiff, and a note "raised $6,508" and a tax on the same amounting to $45.56; that there is no record showing a meeting of the board of councilmen, or the place of meeting, or that any notice had even been given of a meeting, or that there was any trial under section seven of said ordinance; no record that the assessor had made any complaint whatever against this plaintiff. That the arbitrary entry on the book of the assessor after the return of the assessment list entering the name of plaintiff and raising the assessment of his property was made without any notice whatever to this plaintiff, and he had no knowledge whatever of any change made in his assessment until the city collector demanded this unlawful tax. That the plaintiff paid all of the taxes due the city, which was reported by the assessor, but refused to pay this illegal tax, whereupon the said defendant Morgan, acting as collector for the said city, with force and arms unlawfully entered the premises of plaintiff and wrongfully seized and took into his possession the property of your plaintiff and is proceeding to sell the same to satisfy said illegal and void taxes. That said defendant Morgan is insolvent and can not answer in damages to plaintiff for his illegal action.

That by reason of defendant's insolvency plaintiff is utterly remediless by the strict rules of law, and that his property will be sold and sacrificed unless this court could interfere by injunction to restrain the illegal acts of said defendant Morgan. The prayer was for an injunction restraining the collector from selling the plaintiff's property, etc. A temporary injunction was granted.

Afterwards, a demurrer was interposed to the petition on the grounds (1), that it did not state facts sufficient to constitute a cause of action and (2), that plaintiff had an adequate remedy at law, which, being overruled the defendant refused to plead further. A final decree was ordered making the temporary injunction perpetual. The defendant has appealed.

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The errors complained of, if any there be, arise on the record proper. For the purpose of considering the grounds of the demurrer the allegations of this petition must be taken as if admitted. If there was no note or report by the assessor to the board of revision and appeals of any delinquency on the part of the relator, as seems to have been the case, it would seem that the list of the property delivered by the relator to the assessor was quite conclusive on the board of revision and appeals. If both the relator and the assessor were content with the former's list and there was no appeal it is quite difficult to understand from whence the board derived its authority to in any way change that list and especially so without giving the notice of its sitting required by ordinance. Mining Co. v. Neptune, 19 Mo. App. 438; State v. Spencer, 114 Mo. 574; Railway v. Cass Co., 53 Mo. 17.

It appears that the relator's list was not changed by a board of councilmen sitting as a board of revision and appeals in conformity to a notice of the secretary, given in pursuance of the direction of the mayor but by a board of revision and appeals, the notice of the time and place of whose sitting was not given within the time required by said ordinances, nor by an officer having the requisite authority to do so. The case presented by the plaintiff's petition is, that after the relator's list had been delivered to, and accepted by the assessor, without any objection thereto being noted by the latter, or any report being made by him of any delinquency on part of relator in relation thereto, the board of councilmen, not sitting in pursuance of the notice required by the ordinances of the city, met and changed the relator's list. This board was not, in a legal sense, a board of revision and review, and if it had been there was no appeal by which the relator's list was brought before it for revision. The question now raised is, was the change made by said board in the list of property given by the relator to the assessor of any validity? Laws for the assessment and collection of the revenue should be construed with

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reasonable strictness. State v. County Court, 13 Mo. App. 53; State ex rel. v. St. Louis County, 84 Mo. 234; Lynch v. Donnell, 104 Mo. 519. In Railway v. Apperson, 97 Mo. 300, it is declared that, whenever, by legislative enactment, power is confided to a particular person or tribunal to perform specified acts, especially acts relating to the exercise of the important power of taxation, such legislative enactment is mandatory in its nature and must be strictly observed; and such power, in order to its validity, must be exercised and exercised only by the person or tribunal upon whom or on which it is in terms confided. This doctrine is recognized everywhere, and disputed nowhere. The power to tax is a high governmental power and when the legislature grants that high power to another tribunal, it can only be exercised in strict conformity to the terms in which the power is granted and a departure in any material part will be fatal to the attempt to exercise it. Kansas City v. Railway, 81 Mo. 285; Blackwell on Tax Titles [2 Ed.], 255; Campbell County Ct. v. Taylor, 8 Bush. 206; Westfall v. Preston, 49 N. Y. 353; Beckwith v. English, 51 Ill. 147.

Applying the foregoing principles to the admitted facts of the present case and it becomes plain that the action of the board of councilmen in changing the list of property given by relator to the assessor was an unauthorized and arbitrary exercise of power which can not be upheld. It follows that the said $45.56, the amount of the increase of the relator's tax, resulting from the unwarranted change made in the list of his property, and for the payment of which the collector seized his property, was invalid. The facts stated in the petition clearly show that the tax for which the levy was made is void and that its payment ought not to be enforced by the seizure and sale of relator's property. The relator paid that part of his tax which was extended against the property included by him in his list, declining only to pay that part which was not so included, and no reason is seen why, under the present statute

in relation to injunctions, and the rulings of the supreme court, the relator may not successfully invoke the injunction process of a court of equity. In Overall v. Ruenzi, 67 Mo. 203, a case in many respects analogous to this, it was said, "this court has been disposed to regard with favor, proceedings that are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished. We see no objection therefore in the mode adopted in this case to test the validity of the tax." As it clearly appears from the several allegations of the petition that the tax was not levied in conformity to the requirements of the ordinances of the city, and was for that reason illegal, it is immaterial whether the collector who is seeking to enforce it by a seizure and sale of the relator's property was or was not insolvent. Sills v. Goodyear, 80 Mo. App. 128, and cases there cited; Railway v. Apperson, *supra*; Valle v. Zeigler, 84 Mo. 214.

We are therefore of the opinion that the demurrer was properly overruled and that the decree was for the right party and should be sustained, and it is accordingly so ordered. All concur.

C. P. RIDER, Respondent, v. JOHN KIRK, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Action:** PLEADING: PARTIES: JURISDICTION: PRINCIPAL AND AGENT. A petition against a defendant and his principal is held to be without defect except as to parties; and the dismissal as to the agent left a cause of action against the principal of whom, being a non-resident and unfound in the county, the court had no jurisdiction which the defendant waived by answering over without objection.

2. **Principal and Agent:** SCOPE OF AUTHORITY: INSTRUCTION. An agent to buy horses has no authority to borrow money for his principal unless the money is necessary to carry on the business of buying the horses, such as purchase of food for the horses bought; an instruction to this effect is approved.

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3. **Interest:** ALLOWANCE OF: DEMAND: REMITTITUR. **Interest allowed on certain claims before suit brought without demand of payment is erroneous, but may be remitted where the amount is certain.**

4. **Costs:** APPEAL: ABSTRACT. **An abstract which is larger than reasonably necessary to call attention to the errors complained of will justify the appellate court in its discretion to divide the costs.**

Appeal from the Linn Circuit Court.—*Hon. J. P. Butler*, Judge.

AFFIRMED WITH REMITTITUR.

Chas. K. Hart for appellant.

(1) One who contracts with the agent of an undisclosed principal, may hold the latter, but can not hold both the agent and principal. There is no joint liability. Sessions v. Block, 40 Mo. App. 569; Provenchere v. Reifess, 62 Mo. App. 50. (2) The objection that the petition does not state a cause of action, is not waived by answer, but may be raised at any time during trial. Walker v. Point Pleasant, 49 Mo. App. 244; Brown v. Shock, 27 Mo. App. 351. And may properly be raised by objection to the introduction of any evidence under petition. Hatten v. Randall, 48 Mo. App. 203; Mumford v. Keet, 65 Mo. App. 502. (3) It devolves upon the plaintiff to prove his own case, and unless he does so, the defendant is under no obligation to show that the plaintiff has no case, and a demurrer to the evidence should be sustained. Krampe v. Brewing Ass'n, 59 Mo. App. 277; Hunt v. Railroad, 89 Mo. 607; Hyde v. Railroad, 110 Mo. 272. (4) Respondent Kirk, being a resident of the city of St. Louis, and improperly joined as a defendant in this action, the court acquired no jurisdiction over him. (5) The court erred in granting instructions on the part of the plaintiff because thereby the jury was instructed that they should find for the amount claimed in the several counts of the petition, with interest from date when money was loaned and horses sold, and did not submit

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to the jury the question of a demand for payment. This is an action on account for property sold and money loaned, and does not draw interest prior to demand. Revised Statutes of 1889, sec. 5972; Southgate v. Railroad, 61 Mo. 89; Petty v. Douglass, 76 Mo. 70; Newman v. Newman, 29 Mo. App. 649. Wolff v. Matthews, 98 Mo. 246. And where judgment is for an amount too large, and such excess is caused by a wrongful allowance of interest, the judgment will be reversed. Thompson v. School Dist., 71 Mo. 495. (6) An agent can not bind principal by acts beyond his authority. Brosnahan v. Brewing Co., 26 Mo. App. 386.

H. K. & H. J. West and *J. M. Johnson* for respondent.

(1) Plaintiff had a right of action against either of the defendants, but not against both of them. If this be true, plaintiff has in this case sued two persons jointly who are not jointly liable. This is a misjoinder of parties defendant. And as this misjoinder appeared affirmatively upon the face of the petition it could have been taken advantage of by demurrer to the petition. Defendant Kirk did demur to the petition on the ground of misjoinder and if he had stood upon this demurrer when it was overruled, instead of filing an answer and going to trial, he would now be in position to urge that there was a misjoinder of parties defendant. By filing an answer and going to trial the defendant Kirk waived the defect of parties defendant. R. S. 1889, sec. 2043, 2047; Finney v. Randolph, 68 Mo. App. 557. By his general appearance he waived all objections, if any existed, to the service of process. (2) The law will not permit a defendant to file an answer, go to trial and try his luck before a jury, and then after losing out assert in the appellate court that the lower court had no jurisdiction over his person. R. S. 1889, sec. 2013; Meyer v. Broadwell, 83 Mo. 571; Pry v. Railway, 73 Mo. 123; Peters v. Railway, 59 Mo. 406. (3) Respondent admits that these

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instructions are wrong in so far as they allow a recovery for this $26.50 interest. It is earnestly insisted, however, that this case should not for this error be reversed. Having failed to urge or call the attention of the lower court to the question of interest, in his motion or otherwise, he can not now urge or profit by his own laches. R. S. 1889, sec. 2085; Stone v. Wolfskill, 59 Mo. App. 441. (4) It is not contended that an agent can bind his principal by any act beyond the scope of his authority, but an agent who is clothed with authority to buy horses in north Missouri and ship them to his principal in East St. Louis, must of necessity have authority to bind his principal for feed and care of the horses.

ELLISON, J.—This is an action founded on a petition of several counts and may be stated to involve the validity of several claims against defendant which have been assigned to plaintiff. The judgment in the trial court was for plaintiff.

The case was originally brought against defendant and one Enberg in which the liability of defendant was sought to be fixed by reason of the acts of Enberg as his agent. At the close of the trial and before the case was finally submitted plaintiff dismissed as to Enberg. The defendant resided in St. Louis and Enberg in Linn county where the action was brought. Service was had by serving summons on Enberg in Linn county and by serving summons on defendant in St. Louis. The petition was based on an alleged right to hold Enberg as agent and defendant as an undisclosed principal in the same action. A demurrer thereto was filed and overruled and defendant then answered over to the merits and went to trial. There was evidence tending to support the charge that defendant was principal for Enberg and we need only look to the legal phase of the case as it has been presented.

It is insisted that there was no cause of action stated in that it was sought to hold both the agent and the undisclosed principal in the same petition; and that defendant, residing

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in St. Louis, Missouri, and the case being dismissed as to Enberg, the only resident where the suit was brought, the court had no jurisdiction over the person of defendant. If no cause of action was stated, it arose from the fact of a misjoinder. Therefore the defect was more in the nature of a misjoinder or defect of parties than from a lack of statement of a cause of action. When the case was dismissed as to Enberg it left a cause of action stated against defendant. But as defendant was a non-resident and not being found in Linn county, plaintiff could not, as an original proposition, maintain a personal action against him there. At the same time there was nothing to prevent him from waiving this right to assert non-jurisdiction and submitting himself to the jurisdiction of that court. And this he did by answering the petition and going to trial, without objection to jurisdiction. Meyer v. Broadwell, 83 Mo. 571; Pry v. Railway, 73 Mo. 123; Peters v. Railway 59 Mo. 406.

It is contended that the court erred in modifying instruction 9 for defendant, in reference to the counts of the petition for borrowing money, by adding to the proposition, that defendant was not liable for borrowed money unless he authorized Enberg to so borrow, the words, "unless the money was necessary to carry on the business of buying horses." The money borrowed was for feed for and care of the horses after purchase and before shipment to defendant. Money for such purpose was necessarily included in the authority to buy the horses and no error was committed. These remarks dispose also of the objection to the modification of instruction 15.

It is conceded that there was error in including interest on the claims which accrued before suit was brought, since there was no demand. This excess amounts to $26.50 and is remitted by plaintiff. General objection was made to the instructions which allowed the excess.

An abstract of much less proportion than the one furnished here would have been ample to have called attention

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to this error and hence we have concluded to divide the costs of the appeal equally between the parties. The judgment will therefore be affirmed less the $26.50 excess of interest and costs will be divided as stated. All concur.

J. L. LOWRANCE, Trustee, ex rel. ANNA ALLEN, Respondent, v. L. BARKER, et al., Appellants. 82 125 d86 45

Kansas City Court of Appeals, December 4, 1899.

1. **Fraudulent Conveyances:** UNRECORDED MORTGAGE: CONTINUING BUSINESS: ESTOPPEL. Where a mortgagee withholds his mortgage from record and permits the mortgagor to carry on business with the mortgaged goods in the usual course, such mortgage is void as to subsequent creditors and the mortgagee is estopped from setting it up.
2. **Sales:** BILL OF: CHANGE OF THEORY. A party whose original petition based his title on a chattel mortgage and whose amended petition only claims title without stating the source and who in fact held under the mortgage, can not, when the mortgage is declared void, claim under a bill of sale taken on the same day that attachments were issued against the vendor.
3. **Fraudulent Conveyances:** PLACE OF REPENTANCE: ABANDONMENT OF FRAUD. Before a fraudfeasor can plead his repentance so as to hold under a subsequent title, he must abandon the fraud and base his whole claim on the *bona fide* transaction.

Appeal from the Carroll Circuit Court.—*Hon. W. W. Rucker*, Judge.

REVERSED.

Lozier & Morris for appellants.

(1) The mortgage in question was fraudulent in law, because to the grantor's use, as shown by its terms. Bullene v. Barrett, 87 Mo. 185; Bank v. Powers, 134 Mo. 432; Hisey v. Goodwin, 90 Mo. 366. (2) This mortgage was also fraud-

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ulent in fact. Russell v. Rutherford, 58 Mo. App. 550; Helm v. Helm, 52 Mo. App. 615; Hisey v. Goodwin, 90 Mo. 366; Bank v. Doran, 109 Mo. 40. (3) Fraud in fact is not cured by actual possession, even though such possession was of a character to satisfy the requirements of law in ordinary cases. Joseph v. Boldridge, 43 Mo. App. 333; McKinney v. Wade, 43 Mo. App. 152; Wait on Fraudulent Conv. [3 Ed.], sec. 357; Mallmann v. Harris Bros., 65 Mo. App. 127 (133); Boland v. Ross, 120 Mo. 208, 217, 218; Barton v. Sitlington, 128 Mo. 164, 174. (4) Withholding a mortgage from record. A mortgagee who withholds his mortgage on a stock of goods from record for fear of injuring the credit of mortgagor and thereby induces creditors to extend credit to the mortgagor, invalidates the mortgage as to such creditors. Williams v. Kirk, 68 Mo. App. 457; Bank v. Doran, 109 Mo. 40; Barton v. Sitlington, 128 Mo. 164, 174; Bank v. Frame, 112 Mo. 502; Root v. Hart, 29 N. W. Rep. (Mich.) 29; Bank v. Buck, 123 Mo. 141; Paper Co. v. Guenther, 30 N. W. Rep. (Wis.) 298; Cutler v. Steele, 48 N. W. Rep. (Mich.) 631. Attaching creditors who have extended credit between date of mortgage and its filing, on the faith that mortgagor was the owner, have a "superior equity" over the mortgagee and therefore "have rights which intervene" and the mortgagor is estopped from asserting his title. Williams v. Kirk, 68 Mo. App. 457; McIntosh v. Smiley, 32 Mo. App. 125; Nicholson v. Merstetter, 68 Mo. App. 441; Wait on Fraud. Conv. [3 Ed.], sec. 235; Jones on Chattel Mortgages, sec. 337a; 2 Cobbey on Chattel Mortgages, secs. 623, 624, 625. (5) There was no actual and continued possession taken under the mortgage, such as satisfies the demands of the law. State ex rel. v. Flynn, 66 Mo. App. 373; State ex rel. v. Durant, 53 Mo. App. 493; Bank v. Powers, 134 Mo. 433. (6) The claim relator now makes as to her right to the property under the pretended bill of sale is too preposterous to be seriously considered. (7) If relator claims title through the bill of

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sale, there must be an absolute abandonment of the fraudulent mortgage, and actual, continued, open and notorious possession taken under the bill of sale. There is no evidence this was done. On the other hand relator claimed under the fraudulent mortgage. Wait on Fraud. Conv. [3 Ed.], secs. 357, 358; State to use v. Distilling Co., 60 Mo. App. 437.

J. L. Minnis for respondent.

(1) The judgment will be affirmed if there is any evidence in the case which tends to uphold it. Moore v. Railway, 73 Mo. 438. This court, in determining whether the evidence is sufficient to support the finding for relator, will (laying aside defendant's controverting evidence), assume that relator's evidence is true and will give to it every favorable inference which may be reasonably and fairly drawn from it. Cohn v. Kansas City, 108 Mo. 387. And will affirm the judgment unless it is clearly manifest that the judgment was the result of the prejudice or misconduct of the trial court. Zweigardt v. Birdseye, 57 Mo. App. 462. (2) Relator, in good faith, purchased the stock of goods and entered into possession thereof under the bill of sale prior to the levy by the constable and was therefore entitled to judgment. The State to use v. Nelson Distilling Co., 60 Mo. App. 437; Dougherty v. Cooper, 77 Mo. 528. Relator's possession was sufficient under the statute. Dyer v. Balsley, 40 Mo. App. 554; Sharpless Bros. v. Derr, 62 Mo. App. 359. In any event the sale was valid until a reasonable time had expired for delivery of possession. R. S. 1889, sec. 5178; Boot and Shoe Co. v. Bain, 46 Mo. App. 581; State to use v. King, 44 Mo. 238; State ex rel. v. Durant, 53 Mo. App. 493. (3) As to whether there was any fraud in fact was a question of fact, and the finding of the trial court thereon is conclusive. Frederick v. Allgaier, 88 Mo. 598.

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ELLISON, J.—Relator claimed to own a stock of merchandise under the terms of either a mortgage or a bill of sale or both, it being a matter of dispute whether the claim was one or the other. The mortgage and the bill of sale were executed by Mrs. Kate Hopkins to relator who was a former owner of the goods. Defendant is a constable and as such he levied several writs of attachment on the goods as the property of Mrs Hopkins who was a debtor of the attachment plaintiffs. He afterwards sold the goods and thereupon this relator, Mrs. Allen, brought this action on his bond and prevailed in the circuit court.

It appears that relator owned the goods and sold them to Mrs. Hopkins, getting a cash payment of $50, and taking from her a chattel mortgage on the stock to secure notes for the balance of the purchase money. This mortgage was not recorded until the day of the levy of the attachment, a period of ten or eleven months. Mrs. Hopkins was in possession of the store selling the goods and purchasing others, the attachment plaintiffs having sold to her without knowledge of such mortgage and in the belief that her stock was not incumbered. It was shown that the goods would not have been sold to her on credit if it had been known there was a mortgage. Relator's husband, who transacted her business, was Mrs. Hopkins' brother and he testified as follows:

"Q. Well, did anybody say anything about recording the mortgage at the time? A. No, sir; I run it of my own accord.

"Q. You just held it upon your own accord? A. Yes, sir.

"Q. And out of regard for your sister? A. Yes, sir.

"Q. Just out of regard for her and you didn't want to injure her credit by putting it of record? A. I don't think her credit was injured.

"Q. But you withheld it from the record in order that her credit would not be injured? A. No, sir, I did not.

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"Q. It was from regard for her; you wanted the business to be a success?

"Plaintiff's counsel objected.

"The Court: I think the witness has answered that."

We have no doubt that the mortgage was fraudulent and void as to these creditors. Relator's conduct in withholding the mortgage from record estops her from setting it up against them. We so decided in two cases where the reasons and authorities on the question may be found. Williams v. Kirk, 68 Mo. App. 457; Dry Goods Co. v. Brown, 73 Mo. App. 245. In addition to the authorities there cited, see Cutler v. Steele, 85 Mich. 627; Standard Paper Co. v. Guenther, 67 Wis. 101.

But is is claimed that relator's title is good against the attaching creditors under the bill of sale which Mrs. Hopkins executed to her the morning of the day the attachments were levied. An examination of the record satisfies us that this claim has no real support. It appears that it was taken on the day the attachments were levied and about two hours after the mortgage was recorded and that afterwards, on the same day, before the levy of the attachments, she took possession of the store by locking the doors. It is apparent from the record that there was no abandonment of the fraudulent mortgage. It was, as stated, recorded that morning and relator's husband testified that he all the time claimed under the mortgage and that he then (at time of trial) claimed under the mortgage. Moreover, the original petition in the cause makes no pretense of a claim under the bill of sale; on the other hand, it affirmatively alleges the claim of right and title under the mortgage and claims a right of action by reason of the mortgage. The amended petition simply claims title without alleging by what means.

So conceding (merely as a concession for present purposes) that this case is one where repentance for the fraudulent mortgage would have been allowed at the time the bill of sale was

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executed, thereby coming within the terms of Peters Shoe Co. v. Arnold (decided at this term), yet there was no repentance here, since there was no abandonment of the fraudulent transaction or claim. The claim in the original petition, persisted in by testimony at the trial, discloses a holding on to the fraudulent transaction and is wholly inconsistent with the theory of repentance of the fraud. There should be an abandonment of the fraud and a sole claim under a *bona fide* transaction in cases where such change is permissible. Peters Shoe Co. v. Arnold, *supra*; Wait on Fraud. Conv., sec. 357.

From the foregoing it is clear that defendant's demurrer to the evidence should have been sustained and the judgment will be reversed. All concur.

DAVID M. MINTER, Respondent, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Common Carriers:** NEGLIGENCE: SHIPPING CATTLE: INSTRUCTIONS: VERDICT. Where there is a claim of negligence in the shipment of certain stock, and the evidence tends to support the allegation with no contributory negligence pleaded, and the case is fairly submitted on the issue of negligence, the verdict is binding.

2. ———: SHIPPING CATTLE: CONTRACT AGAINST HEAT: NEGLIGENCE. A carrier of cattle can not exempt himself by a contract from liability for their overheating occasioned by his negligence.

3. ———: EVIDENCE: AGENCY. The shipper of cattle who shows that a certain person at a station on the line of the railroad had charge of all incoming and outgoing trains at that point and always controlled their movements, makes a *prima facie* case of such person's agency and authority to bind the carrier and shifts the burden upon the carrier to show the contrary.

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Appeal from the Mercer Circuit Court.—*Hon. P. C. Stepp*, Judge.

AFFIRMED.

W. F. Evans and *McDougal & Sebree* for appellant.

(1) The demurrer to the evidence ought to have been sustained. There was no evidence of any negligence on the part of the defendant which caused the death of the cattle. Defendant had the right to stop its train at stations for a reasonable time, and there is not a particle of evidence that the stops were unreasonable. The plaintiff agreed to accompany the cattle and care for and protect them and have them in his sole charge; and further agreed that the company assumed no responsibility for the safety of the cattle whether from heat or reasonable delay of trains. The burden of proof was upon the plaintiff to prove that the defendant was guilty of neglecting a duty which plaintiff had not agreed himself to perform. This being an interstate shipment the contract was binding, and this being so the plaintiff failed to make a case. Burgher v. Railway, 105 Iowa, 335; Grieve v. Railroad, 104 Iowa, 659; Railway v. Weakly, 50 Ark. 397; Railroad v. Sherwood, 132 Ind. 129; Boaz v. Railroad, 87 Ga. 463.

H. G. Orton for respondent.

(1) The evidence showed that the injury to the cattle was caused by the unreasonable length of time the train was held on the side track—six hours in 200 miles—and then cut them out of the train when nearly at the end of the run. (2) The defendant did not, in its answer, aver any negligence of plaintiff contributing to the injury, and there was no evidence that tended to show any neglect on the part of the plaintiff. (3) It is well settled that the defendant could make no contract to relieve itself of the exercise of reasonable care

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in the transportation of these cattle. Levering v. Transportation Co., 42 Mo. 88; Ketchum v. Express Co., 52 Mo. 390; McFadden v. Railroad, 92 Mo. 343; Witting v. Railroad, 101 Mo. 631; Doan v. Railroad, 38 Mo. App. 408; Conover v. Express Co., 40 Mo. App. 31; Leonard v. Railroad, 54 Mo. App. 293; Gourley v. Railroad, 35 Mo. App. 87; Davis v. Railroad, 89 Mo. 340; Sturgeon v. Railroad, 65 Mo. 569; Kellerman v. Railroad, 68 Mo. App. 255; Smith v. Alabama, 124 U. S. 465; Law v. Crawford, 67 Mo. App. 150; Flato v. Mulhall, 72 Mo. 522; Hardware v. Lang, 54 Mo. App. 147; Waite v. Bartlett, 53 Mo. App. 378; Bayhydt v. Alexander, 59 Mo. App. 194.

ELLISON, J.—Plaintiff shipped over defendant's road from Millgrove, Missouri, to Chicago, Illinois, for the market thirty head of large and fat beef cattle. The shipment was made in July, 1897, during very hot weather. Three of the animals died en route from overheat caused, as plaintiff contends, by the negligence of defendant's servants. There was verdict for plaintiff for $200.

There was evidence tending to prove negligence of defendant's servants. It was shown that when the cars were in motion the circulation of air tended to keep the cattle in good condition, but that defendant stopped at stations for an unnecessary length of time and left the cars in which the cattle were loaded at points with reference to other cars where they could not have the advantage of the breeze, and this after they knew that one of them had died from heat and two others were down. That the train was delayed by standing on track six hours in a distance of two hundred miles. That plaintiff at Eldon station objected to going further with his stock on account of the delays thus injuring his cattle when he was assured that from thence on there would be a better run, when in fact there was no improvement made. Plaintiff again protested at Rock Island where the cattle were cut out from the

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train and left for more than two hours. No contributory negligence on plaintiff's part was pleaded and none proved. The case was fairly submitted to the jury on the question of defendant's negligence and the verdict was for plaintiff.

There was a contract which placed plaintiff in charge of his cattle while being transported and which purported to exempt defendant from liability from injury from heat. But notwithstanding this, defendant would yet be liable for any overheating which was occasioned by its negligence.

It was the yard master who told plaintiff at Eldon, that he would have a better run from thence on and defendant makes the point that there was no evidence showing such person had authority to bind defendant by his assurances of a better run on plaintiff objecting to going any further with the cattle. We think there was sufficient evidence of his authority *prima facie*. It was shown that he was in charge of all trains at that point—making them up and sending them out. He had charge of all the incoming and outgoing trains at that point. Plaintiff had shipped cattle over defendant's road prior to this and knew this man to be the same who had always assumed authority over the trains.

It can not be expected that in all instances a mere shipper could get direct and affirmative evidence of the employment and special authority of the different railway employees with whom he may come in contact. He can, ordinarily, do no more than plaintiff has done here. After plaintiff's *prima facie* showing it would have been an easy matter for defendant to show the man was not the agent plaintiff claimed him to be if such was the fact.

We have not discovered any error and hence affirm the judgment. All concur.

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OLLIE SKIPTON, Appellant v. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, December 4, 1899.

1. **Negligence**: FOOTMAN ON RAILROAD BRIDGE: PLEADING: EVIDENCE: DEFECTS IN FOOTPATH: LIGHTS. Where the petition by a footman on a railroad bridge counts for injuries resulting from a collision with the end of the pilot beam but says nothing of defects in the footway, evidence of defects on the outer edge of such footway are without causal connection with the injury and are properly rejected; so with regard to the absence of lights on the bridge where the petition alleged that the headlight dazzled and blinded the plaintiff.

2. ———: ———: SIGNALS: NOTICE. Where a footman on a railroad bridge is injured by a collision with the pilot beam, it is immaterial whether the engineer gave the signals if the footman had notice of the coming train.

3. ———: ———: PRESUMPTION: WARNING. An engineer observing a footman on the footpath of a railroad bridge has the right to presume such footman will place himself sufficiently distant from the rails to avoid contact with the engine, and words of caution, if within hearing, are as effective to give notice as bells or whistles.

4. ———: ———: PASSING TRAIN: CONTRIBUTORY NEGLIGENCE. To stand or walk on a railroad track or so near thereto as to be in the way of a passing train will defeat recovery for injuries received from collision with such train.

5. ———: CONTRIBUTORY NEGLIGENCE: ENGINEER: PRESUMPTION. Where the driver of a vehicle or a footman is near a railroad track with a passing train thereon, the presumption of negligence causing a collision, is with such driver or footman and not with the engineer of the train who is not compelled to provide against the unexpected, the unusual or the extraordinary, or to anticipate that such driver or footman will negligently expose himself.

6. ———: FOOTMAN ON RAILROAD BRIDGE: EVIDENCE: DEMURRER. Evidence of a collision resulting in the injury of a footman on a railroad bridge is examined and a judgment sustaining a demurrer to the evidence is affirmed.

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Appeal from the Buchanan Circuit Court.—*Hon. W. W. James*, Judge.

AFFIRMED.

Grant S. Watkins and *James W. Boyd* for appellant.

(1). The court committed error in instructing the jury to find for respondent. Scoville v. Railroad, 81 Mo. 434; Hanlon v. Railway, 104 Mo. 381; Fiedler v. Railway, 107 Mo. 645; Lynch v. Railroad, 111 Mo. 601; Reardon v. Railway, 114 Mo. 384; Chamberlain v. Railway, 133 Mo. 587; LeMay v. Railway, 105 Mo. 361; Williams v. Railway, 96 Mo. 275; Kelly v. Railway & Transit Co., 95 Mo. 279; Dunkman v. Railway, 95 Mo. 233; Baird v. Railway, 146 Mo. 265; Frazier v. Railroad, 75 Mo. App. 253; McCormick v. Monroe, 64 Mo. App. 197; Meyers v. Railroad, 59 Mo. 223; Petty v. Railroad, 88 Mo. 306. (2) The court excluded proper and legal evidence offered by the appellant. See cases above cited and Kansas v. McDonald, 6 Am. Neg. Rep., p. 67, Supreme Court of Kansas. (3) The court committed error in refusing to submit appellant's case to the jury. See cases above cited. (4) Appellant made out a strong case and was entitled to have the jury pass on it.

M. A. Reed and *Gardiner Lathrop* for respondent.

(1) The trial court committed no error in excluding the evidence offered to show holes in the floor of the bridge. Under such circumstances it was not prejudicial error to exclude evidence of its condition. If admitted, it would not have relieved her of contributory negligence. Weld v. Railway, 17 Pac. Rep. 306-309. (2) The examination and the cross-examination must relate to facts in issue and be relevant thereto. 7 Am. and Eng. Ency. of Law, 108; Diel v. Stegner, 56 Mo. App. 540; Brooks v. Blackwell, 76 Mo. 309; State to use v. Roberts, 62 Mo. 390. (3) On the trial of the case

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plaintiff offered to prove that from the time she entered the bridge until she was struck by the engine, no bell was rung on the engine and no whistle was sounded; but the court excluded this testimony and such ruling is now claimed to be error. It is well established law, even as to statutory signals, that the party injured must be able to show that the omission of the signals was the proximate cause of the injury, and in no case can one recover on account of such omission, who, by other means, has timely notice of the approach of the train, for after he has seen the danger the purpose of the signals is subserved, whether they have been given or not. 3 Elliott on Railroads, sec. 1158; 11 Am. and Eng. Railroad Cases (N. S.), 92; Kreis v. Railroad, 49 S. W. Rep. 879; Pakalmsky v. Railroad, 82 N. Y. 424; Railroad v. Waltz, 40 Kan. 433; State v. Railroad, 35 Am. and Eng. Railroad Cases, 412; Saldana v. Railroad, 43 Fed. Rep. 862. Our own supreme court recognizes the above rule of law. Moody v. Railroad, 68 Mo. 474; McManamee v. Railway, 135 Mo. 440. (4) Opposite counsel also complain that they were not permitted to prove that there were no stationary lights on the bridge. This accident did not happen on a part of the bridge where it was dark. On the contrary, plaintiff alleges in her petition such an excess of light that she was completely dazzled thereby. The law gives those in control of a train the right to presume that, as plaintiff and her companion were coming directly towards the train, they were in possession of their senses, and that they would see not only that the train did not run over them, but that they would also see that their persons were far enough away not to be hit by the passing train. Maloy v. Railroad, 84 Mo. 275-276; Beach on Con. Neg. [3 Ed.], secs. 393, 394; 3 Elliott on Railroads, sec. 1253; Candee v. Railroad, 130 Mo. 152; Maxey v. Railroad, 20 S. W. Rep. 654; Brennan v. Railroad, 83 Fed. Rep. 124; Kreis v. Railway, 49 S. W. Rep. 878; Railroad v. Roberts, 37 S. W. Rep. 870; Railroad v. Brinson, 19 Am. and Eng. Railroad Cases, 56, 52, 55; Pzolla

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v. Railroad, 19 Am. and Eng. Railroad Cases, 334-337; Bacon v. Railroad, 15 Am. and Eng. Railroad Cases, 412-413; Railway v. Stroud, 31 Am. and Eng. Railroad Cases, 446-447; Austin, Adm'r, v. Railroad, 91 Ill. 38; Railroad v. Modglin, 85 Ill. 481-484; Moody v. Railroad, 68 Mo. 473, 474; Fletcher v. Railroad, 64 Mo. 488; Wharton's Law of Neg., sec. 384; Loring v. Railroad, 128 Mo. 349-360; 2 Thompson on Neg., 1157; Little v. Car. Cen. Co., 26 S. E. Rep. 110; 4 Elliott on Railroads, sec. 1703, and cases cited; 129 Mo. 374, and cases considered.

SMITH, P. J.—This is an action brought by the plaintiff to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant. There was a trial in the court below and at the conclusion of the evidence adduced by the plaintiff the defendant interposed a demurrer thereto which was sustained and judgment given thereon accordingly for defendant, from which the plaintiff has appealed. The only question raised by the appeal for our decision is as to the propriety of the action of the court in respect to the demurrer.

The evidence given for plaintiff discloses that the defendant owns a railroad bridge over the Missouri river at St. Joseph, in this state, over which it runs its trains in the transaction of its business as a common carrier. This bridge was about a quarter of a mile in length and sixteen feet, ten inches in width. The floor of the bridge throughout its entire length and width was planked, and in the center of the bridge was laid a railroad track, the rails of which were four feet, eight inches apart, and the space consequently on each side of the track, between the track and the side of the bridge, was six feet and one inch in width. This space on each side of the track was at the time of the accident, and for years before, used by pedestrians as a footpath or sidewalk in crossing the bridge. Plaintiff lived in Kansas, some half or three-quarters

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of a mile from the bridge. She and another girl worked in an overall factory in St. Joseph and had been in the habit of crossing over the bridge on foot to their work every morning before daylight, for nearly a month and a half. The train with which the accident happened was a freight train, running on regular schedule time, and crossed the bridge into Kansas about the same time every morning.

On the morning of January 10, 1898, the plaintiff and her girl companion came from their homes to the Kansas end of the bridge to cross it on their way to the factory. Both the plaintiff and her companion testified that they saw the headlight of an engine as they started in to cross the bridge. The plaintiff testified that when they started, both she and her companion were on the north side of the bridge on the part devoted to foot passengers, and that they continued on that side up until the time of the accident, and that at no time were they between the rails of the track. She says that she and her companion were not walking side by side, neither was one directly behind the other, but that her companion was about a step to her left and nearer to the railing of the bridge, and also about a step in advance of her. This would bring the plaintiff nearer the track. She further states that this relative position was maintained from the time of starting until the accident. The plaintiff further testified that after she first saw the light of the engine she did not keep her eye on it; that she walked to about half way of the bridge before the collision occurred; that the speed of the engine, and train thereto attached, was about three miles an hour. The plaintiff testified further that though she saw the headlight about the time she entered upon the bridge, that she did not know that it was approaching her until she was hit; that she could not tell how long it was before she was hit that she ceased to look at the headlight; that she was at no time on the railroad track; that she was struck by the pilot beam of the engine which others testified was nine feet five inches long; that the

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distance between its projecting ends and the outside of the bridge walk was about three feet four inches.

The plaintiff's companion testified that after the plaintiff had been knocked down and the train was stopped the engineer went back to where she was and asked her if she did not see the headlight of the engine and to which inquiry she replied that she did but thought that she was out of the way. Shartle, the fireman on the train, who was called as a witness for plaintiff, testified that plaintiff shortly after the accident stated to him that she saw the headlight and thought she was far enough away to avoid being hit. It was further shown that the bridge was not provided with lights and that as the train approached the place where the collision took place neither the bell was rung nor the whistle sounded. It was, however, shown that just before the plaintiff was struck she heard the engineer halloo: "Look out, girls."

The court rejected an offer of plaintiff to prove that the floor in the sidewalk of the bridge on which plaintiff was walking was defective in that there were numerous holes therein next to the outside guard rail on the ground that it did not appear from the allegations of the petition, or otherwise, that there was the slightest casual connection between the defect and the injury. Suppose this ruling of the court was improper and the rejected evidence should have been received, yet, was the evidence hereinbefore stated, supplemented by this offer of the plaintiff, sufficient to warrant a submission of the case to the jury?

The fact, if it was a fact, that the defendant had negligently suffered the floor of the bridge to become defective in the manner already stated had no sort of connection with the plaintiff's injury. It indubitably appears that there was ample space on the bridge outside of the railroad track over which the plaintiff could have proceeded with absolute safety had she chosen to do so. There was at least three feet eight inches of space between the west end of the pilot beam that struck

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plaintiff and the outside of the bridge which was all the room plaintiff required to pass safely along. This is satisfactorily shown by the fact that plaintiff's companion, who walked still further out from the track than the plaintiff, did not collide with the pilot beam. It is thus seen that the plaintiff was not obliged to walk as near the railroad track as she did to avoid falling through the holes in the floor of the bridge. If there had been no defect whatever in the floor the plaintiff would have walked exactly where she did. We must therefore conclude with the trial court that the relation of cause and effect was not shown by the rejected evidence to exist between the defect in the floor of the bridge and the plaintiff's injury, and therefore such evidence was wholly irrelevant.

Nor can we see that defendant's failure or neglect to have lights of any kind on the bridge had any connection with the plaintiff's injury. It is alleged in the petition that the headlight in the defendant's engine dazzled and blinded the plaintiff so that instead of there being a deficiency of light on the bridge there was, in fact, an excess. The plaintiff saw the headlight at the east end of the bridge as soon as she entered upon the west end. This light, according to the allegations of the petition, must have penetrated the prevailing fog and darkness and illumined the bridge-way for a considerable distance in advance of the approaching train. It must be conceded that the headlight increased in lightness as it approached from the east end of the bridge, where plaintiff first discovered it. There was nothing in the existing physical conditions to prevent the plaintiff from afterwards seeing that it was not stationary.

The plaintiff was no stranger on the bridge. She had crossed it every morning about the same time as on the morning of the accident for nearly a month before. The train with which she collided was running on its regular schedule time—the same time on which it had been running for many months prior thereto. The plaintiff must have met it many times before the collision while on her way to her work at the

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factory. When she entered the bridge on the west end and saw the headlight on the east end, she must have known what train it was carrying it, and that it was approaching. The fair inference is, that she not only knew the train, whose headlight she had seen, but that it was not standing still. It is almost incredible that under such circumstances she did not know whether it was "coming, going or standing still." It is a matter of common knowledge that when a train or vehicle of any kind is passing over a bridge a peculiar rumbling noise is made, differing from that made when passing over solid ground. This noise was made by the train as it approached the plaintiff. She must be presumed to have heard it. It was a warning to her that the train was approaching and that it must be close by. If it had been so dark that nothing could be seen then her sense of hearing would have acquainted her with this fact.

The conclusion is irresistible that plaintiff was made fully aware of the approach of the train, because she told the engineer of the train, at the time of the collision, that she saw the train but thought she was out of the way. And at another time she told the brakeman that she saw the headlight and thought she was far enough away to avoid getting hit. We must think that the plaintiff saw the train and endeavored to so adjust herself as to avoid contact with its engine. The failure of the defendant to equip the bridge with lights obviously had no connection whatever with the injury. It follows from this, too, that had the defendant given the usual signals to warn the plaintiff of the approach of the train the result would not have been different. The giving of the signals could have had no other effect than to warn her of a fact of which she was already aware. Whether or not the defendant's engineer was bound to give signals on approaching plaintiff it is not material to inquire, since it sufficiently appears that the plaintiff, by other means, had timely warning of the approach of defendant's train. Moody v. Railway, 68 Mo. 474; McManamee v.

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Railway, 135 Mo. 440; 3 Elliott on Railroads, sec. 1158; Pakalmsky v. Railway, 82 N. Y. 424; Railway v. Waltz, 40 Kan. 433.

Again, the plaintiff was proceeding in her walk on a line two feet outside of the rails. This she thought was far enough away to avoid being hit by the defendant's engine. The engineer was at his post on the right side of the cab, which brought him on the side of the track on which the plaintiff was walking. He was looking ahead. While the headlight enabled him to see the plaintiff and her companion perhaps two hundred feet or more ahead it showed that they were both outside of the rails and in no apparent danger. When he came closer and discovered that one of them was in danger of being hit by the engine he vociferated to them "to look out." This was the quickest possible warning that could reach them —quicker than he could have sounded the whistle. He gave the vocal warning as quick as thought, immediately applied the air and stopped the train as quickly as it was possible to do so. The plaintiff had voluntarily placed herself where it was not possible for him to determine accurately whether or not she was far enough outside of the rail to escape contact with some part of the engine until he was within a few feet of her. As soon as he discovered her danger he gave all the warning that was possible for him to give. He had, as we think, the right to presume that plaintiff had placed herself outside of the rails a sufficient distance to avoid any danger of contact with the engine. And as the engine was moving at the rate of only three miles an hour, he had the right to further presume that the plaintiff, if in danger, would—as she could have easily done—step far enough away to avoid any contact with the passing engine. She only lacked a few inches of being far enough away to have avoided the collision, for she was struck by the end of the pilot beam in the left breast. She miscalculated only a few inches at most. If she made a mistake it was based on calculations of her own and not on those of the

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defendant. The law did not require the defendant to give any kind of signal until after the discovery of the plaintiff's danger, and this requirement seems to have been promptly met by defendant's engineer. Words of caution are equally as effective as a bell or whistle, if within reach—as was the case here. Duncan v. Railway, 46 Mo. App. 207. Under the well-settled law of this state, those in control of the the colliding train had the right to presume that as plaintiff and her companion were coming directly towards the train, that they were in possession of their senses, and that they would see, not only that the train did not run over them, but that they would also see that their persons were far enough away not to be hit by the passing train. Maloy v. Railroad, 84 Mo. 275, 276; Beach on Con. Neg. [3 Ed.], secs. 393, 394; 3 Elliott on Railroads, sec. 1253; Candee v. Railway, 130 Mo. 152; Maxey v. Railroad, 20 S. W. Rep. (Mo.) 654.

To stand or walk on a railroad track or so near thereto as to be in the way of a passing train, will defeat a recovery for any injuries received therefrom. Brennan v. Railroad, 83 Fed. Rep. 124; Kreis v. Railway, 49 S. W. Rep. 878; Railroad v. Roberts, 37 S. W. Rep. 870. The supreme court of Georgia have declared: "If when he did leave the track, he made a mistake as to how near he might stand with safety to himself surely the railroad company should not be charged with the consequences of this mistake." Railroad v. Brinson, 19 Am. and Eng. Railroad Cases, 56, 52, 55; Pzolla v. Railroad, 19 Am. and Eng. Railroad Cases, 334-337; Bacon v. Railroad, 15 Am. and Eng. Railroad Cases, 412, 413; Railway v. Stroud, 31 Am. and Eng. Railroad Cases, 446, 447; Austin v. Railroad, 91 Ill. 38; Railroad v. Modglin, 85 Ill. 481-484; Moody v. Railroad, 68 Mo. 473, 474; Fletcher v. Railroad, 64 Mo. 488; Wharton's Law of Neg., sec. 384; Loring v. Railroad, 128 Mo. 349-360.

"When a vehicle and a railroad car are going side by side in the same direction, with a clear space of nearly two feet

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between them, in case of a collision, the presumption of negligence is altogether against the driver of the cart, and not against that of the car, for the reason that the former can deviate from the track, while the latter can not." 1 Thomp. on Neg., 399—near bottom. "One person is not bound to anticipate that another person being *sui juris*, will negligently expose himself or his property to injury, and is not bound to make provision against the consequences of such negligence." 2 Thomp. on Neg. 1157—near top of page. "But he (the engineer) is not required to provide against contingencies which he reasonably has no grounds to believe would happen. He is not compelled to provide against the unexpected, the unusual, the extraordinary. * * * The facts are undisputed, and we think that the only inference that would be drawn from them by fair minded men is that the engineer acted as a prudent man should have acted under all the circumstances, and that he used the ordinary care to prevent the injury." Little v. Car. Cen. Co., 26 S. E. Rep. 110. Quite a thorough examination and consideration of the evidence has not convinced us that the plaintiff's injury was occasioned by the neglect of any duty which defendant owed her, but rather that such injury was the result of her own imprudence and heedlessness.

The judgment will accordingly be affirmed. All concur.

FRANK WAY, Respondent, v. G. W. CADDELL, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Account: EXTINGUISHMENT BY NOTE: WAIVER. An account is not extinguished by a note that does not comply with the agreement between the parties as to the surety; and where the vendor promptly objects to the defect he may sue on the account although he has in the meantime used the note for the maker's benefit as he directed.

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Appeal from the Livingston Circuit Court.—*Hon. E. J Broaddus*, Judge.

AFFIRMED.

Scott J. Miller and *Frank S. Miller* for appellant.

(1) If the plaintiff's theory was correct, then he waived his right by retaining the note eighteen months after knowledge that the defendant had not signed. Shoe Co. v. Bain, 46 Mo. App. 581; Robertson v. Tapley, 48 Mo. App. 239; Botts v. Spencer, 42 Mo. App. 184. (2) And by suing the note after knowledge, he accepted the same as it was, and can not afterwards sue this defendant for the same debt. Perkins v. Headley, 49 Mo. App. 562; Ins. Co. v. Kuhlman, 6 Mo. App. 522. (3) The judgment for plaintiff gives him two judgments for the same debt against different parties. To maintain the last suit, he must tender the first note. He can not have both for the same debt. When he claimed first note was not according to contract and void, he had his election, and hence this judgment is erroneous. Bank v. Fletcher, 5 Wend. 85; Booth v. Smith, 3 Wend. 66; Bank v. Decatur, 13 Ala. 353; Shoe Co. v. Bank, 56 Mo. App. 662; Kirk v. Seeley, 63 Mo. App. 262; Carson v. Smith, 133 Mo. 606; Lewis v. Land Co., 124 Mo. 672.

Oscar L. Smith for respondent; filed a lengthy argument for the respondent.

ELLISON, J.—This is an action for $40, balance on an account for $55, the purchase price of a buggy bought by defendant of the plaintiff. The judgment was for plaintiff. As the finding was for plaintiff we will assume as true what there was evidence tending to prove.

It appears that defendant bought the buggy, paid $15 cash and was to give a note for $—, signed by the Cummins and defendant and his brother. Some time afterwards de-

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fendant brought in the note signed only by the Cummins and delivered it to plaintiff's bookkeeper who, supposing it to be right, laid it away and plaintiff did not discover the error until near a year thereafter when the note was about to become due. That upon making this discovering he wrote to defendant of the breach of his agreement as to the note, when after some interviews concerning the matter, it was understood between them that plaintiff should sue the Cummins on the note and undertake to make the money, and that if he did not defendant was to settle the account. Plaintiff did so; he obtained judgment but has not made the money.

There can be no question that the account for sale of the buggy was not extinguished The note was not the one agreed upon and was never accepted by plaintiff as extinguishing the account. As soon as plaintiff discovered it was not as it was agreed it should be, he notified defendant and his action after that was more for defendant's accommodation than his own. Certain it is that it stands confessed that defendant has obtained plaintiff's property and has not paid for it. His defense is technical and not well grounded. A careful reading of the argument and brief does not impress us with the soundness of the defense. The judgment is affirmed. All concur.

HENRY GLASSCOCK, Respondent, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Railroads: FENCING STATION GROUNDS: JURY QUESTION: EVIDENCE.** A railway company is not required to fence its tracks and put in cattle guards at necessary switches when to do so would endanger the safety of its employees, and the extent of such switches is a question for the jury, and the evidence in this case was sufficient to send the issue to the jury.

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2. ——: ——: CATTLE GUARDS BETWEEN SWITCHES: INSTRUCTIONS. Whether it is proper to construct cattle guards between switches depends upon circumstances, and an instruction should not declare such construction unlawful of itself.

Appeal from the Randolph Circuit Court. *Hon. J. A. Hockaday*, Judge.

AFFIRMED.

Geo. P. B. Jackson for appellant.

(1) The unfenced portion of defendant's track where plaintiff's animal passed upon the same and was struck, was used for switching and passing trains at Holliday station, and defendant was not required to fence at that place. Pearson v. Railroad, 33 Mo. App. 543-546; Jennings v. Railroad, 37 Mo. App. 651; Cox v. Railroad, 128 Mo. 362-371. (2) The evidence was uncontradicted that the safety of employees required that the track should remain unfenced. The demurrer to the evidence should therefore have been sustained. For the same reason the judgment should now be reversed. Jennings v. Railroad, *supra*. (3) The instructions given by the court were inconsistent and misleading. Those given at the instance of defendant excused the defendant from fencing where to do so would endanger the safety of men employed in handling trains passing at that station, while plaintiff's instructions denied this exemption, and limited the excuse from fencing to the special needs of the business with the public at that particular station.

Wight & Woods and *A. H. Waller* for respondent.

(1) It was defendant's duty, under the evidence in this case, to fence all that portion of its uninclosed track east of the town limits for the reasons: First, because at said point said track ran through respondent's farm with meadow land on one side and pasture land on the other and defendant was

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required by law to so fence. Second, because no part of the land uninclosed lying east of the town limits was used or could have been used or was necessary for the transaction of business at Holliday station. Third, because this issue was submitted to the jury upon practically uncontradicted testimony and the issue found against appellant. Russell v. Railroad, 26 Mo. App. 368; Johnson v. Railway, 27 Mo. App. 385; Straub v. Eddy, 47 Mo. App. 192; Chouteau v. Railway, 28 Mo. App. 559; Vanderworker v. Railway, 51 Mo. App. 168; Rozzelle v. Railway, 79 Mo. 350; Kinion v. Railway, 39 Mo. App. 575; Emmerson v. Railway, 35 Mo. App. 625. (2) Appellant's second contention is untenable because the evidence not only fails to show "that the safety of employees required that the track should remain unfenced" but on the contrary does show that the east cattle guard could have been removed west to the town limits and the track fenced to that point, and that thereby the danger to employees would have been materially lessened. And also for the further reason that this issue was submitted to the jury and the finding of the jury was against appellant. Cox v. Railway, 128 Mo. 371.

ELLISON, J.—This is an action to recover double damages on account of defendant having killed plaintiff's jennet by running against her at a place on defendant's railway where it runs through uninclosed lands and where, as plaintiff charges, it was defendant's duty to fence. The judgment in the trial court was for plaintiff.

The accident happened inside of the switch limits at Holliday station but outside of the corporate limits of that town. Defendant is liable to the action unless it was excused from fencing at the place of accident. Its defense is based on the idea that the whole of the switch limits established by it was necessary for the transaction of its business with the public at the station, and especially its necessary business generally in the operation of its road. The cases of Pearson

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v. Railway, 33 Mo. App. 543, and Jennings v. Railway, 37 Mo. App. 651, are relied upon.

Those cases establish the proposition that a railway company is not required to fence its track and put in cattle guards at necessary switches when, to do so, the safety of its employees in switching its cars would be endangered. They establish the further proposition that the space reasonably necessary for these purposes is a question to be determined by a jury and is not left to the discretion of the railway company. The latter proposition was submitted to the jury in this case and the question is presented whether there was evidence to sustain the verdict that it was not.

At the place where the animal was killed the road runs east and west through plaintiff's farm, he having a meadow on the south and a pasture on the north of the tracks. A public road, however, runs parallel with the railway on the north side and thus prevents the pasture from coming up to the right of way. The animal doubtless escaped from the pasture out onto the public road and thence onto the track where it was unfenced. The switch limits lack but a few feet of being one-half mile in length, the station being about 860 feet from the west end and the place of accident being inside the switch limits, about ninety feet from the east end. While the east end was used yet the principal part of the use made of the tracks was up between the west end and the station. The tracks inside the limits consisted of the main track and two side tracks connected therewith, one called the passing track, used principally for passing trains; the other called the house track and used mostly for business connected with freight.

There were two cattle guards maintained by defendant, one about 300 feet west of the west end of the switch limits and the other down about fifty feet beyond the east end; that is, in coming into the switch limits from the west trains passed over a guard 300 feet distant from the head of the switch and in coming in from the east they passed over a guard

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fifty feet from the head of the switch. It is apparent that considering the place where the station and switches were located the switch limits were quite lengthy. The side track known as the passing track was nearly 2,500 feet long, a space sufficient to hold several freight trains of ordinary length. In this connection it is fair to consider in support of the verdict that the cattle guard at the east end could have been placed several hundred feet west of where it was placed, thus permitting the road to be fenced a long distance inside the point where the animal was killed. There was evidence given from which a reasonable inference could be drawn that this would not have endangered the safety of defendant's servants as much as to allow the guard to remain where it was at the time of the accident. As located in the evidence this guard was only fifty feet east of the end of the switch limits while it could have been placed several hundred feet further west and yet been several hundred feet from the head of any of the different switches. In other words, its proximity to a switch head would have been removed many fold and the danger to employees thereby greatly lessened. In our opinion there was sufficient evidence upon which to base the verdict.

Objection is made to plaintiff's instructions in that it is claimed they excluded from the jury a consideration of defendant's business in operating its road generally at that point and limited the inquiry alone to the business of the public with the company at that point. The objection certainly can not apply to the first instruction; the part referred to being as follows: "Unless the jury further believe and find from the evidence that the cattle guards could not have been located at any point west of the place where the jennet strayed upon the track and east of the public road or street and the fences extended thereto without rendering it more dangerous to the lives and limbs of defendant's agents or servants in doing

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switching and other work at Holliday station." This evidently applied to all of the business of the company.

That portion referred to in the second instruction is as follows: "* * * and that in determining this question you must take into consideration the nature and situation of the switch and the use made of it by the defendant and the public in connection with the business at the station." When considered in connection with the first it is apparent that no one would understand that the jury was to confine their consideration to the business the public had with the defendant at that point. A part of "the business at the station" was switching and passing trains and such business was not excluded from the minds of the jury by the two instructions.

Complaint is also made that the court struck out five lines of defendant's second instruction. These lines declared it to be unlawful for, and that the company would not be permitted to construct cattle guards between the ends of switches. Passing by the question whether it was proper to declare that the building of cattle guards between switches was of itself "unlawful," we are confident that no such breadth of statement should have been used. Whether it is proper or prudent to construct a cattle guard between switches in many instances would depend on a variety of circumstances. It may be conceded that usually it is not done, but that affords no ground of support for the broad statement that under no circumstances could it be done.

We do not consider that other points of objection materially affected the merits of the action and we shall affirm the judgment. All concur.

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THE STATE OF MISSOURI ex rel., M. H. MORRIS, Appellant, v. W. H. FIELDS et al., defendants, GEORGE R. REYNOLDS, Respondent.

Kansas City Court of Appeals, December 4, 1899.

1. **Appellate Practice:** ABSTRACT: TRANSCRIPT. The appellate court will not go behind the printed abstract into the transcript to ascertain the evidence or proceedings at the trial. To secure a review of these they must be printed in the abstract.

2. ——: ——: MOTION FOR NEW TRIAL: INSTRUCTIONS. The printing in the abstract of the motion for a new trial in which is inserted instructions given or refused by the court will not authorize a review of such instructions by the appellate court. Recitals in such motion can not be taken as true unless authenticated by the bill of exceptions signed by the judge.

Appeal from the Randolph Circuit Court.—*Hon. J. A. Hockaday*, Judge.

APPEAL DISMISSED.

T. B. Kimbrough for appellant filed a long argument on the merits.

Martin, Terrill & Martin for respondent filed argument on merits.

GILL, J.—This suit was brought by plaintiff Morris on a bond given by defendant Fields as receiver of a milling company. It seems that after the debts of the milling company were all paid the receiver had a surplus in his hands and which the court ordered said receiver to pay the stockholders of the milling corporation, $45 to the share. Morris claimed to own sixteen shares which had formerly belonged to certain other stockholders, but on these the receiver declined to pay the dividend because said shares were claimed by respondent

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Reynolds. Thereupon Morris instituted this action on the bond of the receiver, who answered setting up the fact of Reynold's claim, tendering the money in court, and asking that Reynolds be required to come into court and by a proper proceeding litigate and settle the title to said stock and the dividends thereon. Reynolds came into the case, made his claim, and upon the issues framed between Morris and Reynolds, a trial was had before the court, without the aid of a jury, resulting in a judgment in Reynolds' favor, and Morris thereupon appealed to this court.

I. In view of the condition of the appellant's abstract, it will be impossible to dispose of the merits of this appeal. The appellant has failed to furnish the abstract required by rule 15 of this court. Enforcing then rule 18 the appeal must be dismissed.

We have been asked to review the entire evidence introduced in the lower court and yet only a fractional part of that evidence is included in the so-called abstract—the appellant referring us to the transcript where it is said we will find it all complete. It has been repeatedly declared by this and the supreme court that we will not go beyond the printed abstract to learn what was the evidence or proceedings at the trial. If it is sought to have the appellate courts of this state examine the evidence, the rules and decisions of all the courts require that it be printed in the abstract. Craig v. Scudder, 98 Mo. 664; Brand v. Cannon, 118 Mo. 595; Halstead v. Stone, 147 Mo. 649; Trimble v. Wollman, 62 Mo. App. 541; Bowlin v. Creel, 63 Mo. App. 229; Finkelnburg App. Prac. 103, and numerous other cases there cited.

II. Again, complaint is made as to the court's rulings on instructions, and yet the abstract fails to show that any instructions were given or refused, or that any exceptions were saved to the court's action in that respect. It is true that the abstract includes a motion for new trial wherein it is complained, that "the verdict and finding of the court is against

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the law as declared in instruction number 2 given, which is as follows" (copying it), "and against the law as declared in instruction number 3 given by the court as follows (copying said No. 3); and as a fourth ground for a new trial it is said the court erred in refusing to give certain instructions (copying them). But that these instructions were ever in fact given or refused, or that the court's action in respect thereto was objected to at the time or exceptions saved, does not appear from the abstract. Indeed we are not authorized to assume that any such instructions were ever given or refused. The recitals in the motion for new trial are not to be taken as true. The motion for new trial does not, of itself, prove any fact not shown by the record. The bill of exceptions, outside the motion for new trial, must show and set out the instructions given or refused as also that exceptions were saved. The verity of such proceedings must be authenticated and certified to by the signature of the trial judge, not by the statement of counsel embodied in the motion for new trial. The rulings on instructions, like other matters in course of the trial, are matters of exception to be saved at the time of their occurrence, and it is too late to object for the first time in the motion for new trial. The following are a few of many cases that sustain these views. State v. Foster, 115 Mo. 448; and cases cited; State v. Forsythe, 89 Mo. 667; Proffer v. Miller, 69 Mo. App. 501; Norton v. Railway, 40 Mo. App. 642; Skaggs v. Given, 29 Mo. App. 612.

The appeal then must be dismissed. All concur.

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EDWIN LARKIN, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Telegraphs: OWNERSHIP OF LINES: EVIDENCE. Evidence in this record is held sufficient to constitute a *prima facie* case of ownership of certain telegraph lines in the defendant and to put it on its defense.**

2. **———: NEGLIGENCE: INSTRUCTION: JUDGMENT: HARMLESS ERROR. An instruction set out in the opinion if faulty in assuming the ownership of certain telegraph lines is not such error as materially to affect the merits of the action and work a reversal, since the judgment is for the right party.**

Appeal from the Boone Circuit Court.—*Hon. J. A. Hockaday*, Judge.

AFFIRMED.

George H. Fearons, *W. M. Williams*, *A. F. Smith* and *Karnes, New & Krauthoff* for appellant.

(1) There was no evidence that the telegraph line running into the depot near where the accident happened belonged to the Western Union Telegraph Co. "Every plaintiff must prove by competent testimony the facts upon which he is to recover." Moore v. Railway, 28 Mo. App. 622, 628; Diel v. Railway, 37 Mo. App. 454, 458; McCartney v. Finnell, 106 Mo. 445, 453, 454; Railroad v. Rooker, 13 Ind. App. 600, 603; 41 N. E. Rep. 470; McKee v. Boswell, 33 Mo. 567; Morris v. Barnes, 35 Mo. 412; Robbins v. Phillips, 68 Mo. 100; Turner v. Railroad, 76 Mo. 261, 262; Vaughn v. Railroad, 15 Mo. App. 597, 598; Avery v. Fitzgerald, 94 Mo. 207, 216; Jesse v. Davis, 34 Mo. App. 351; Robbins v. Railway, 34 Mo. App. 609; Whitmore v. Crawford, 106 Mo. 435; Long v. Moon, 107 Mo. 334; Hewitt v. Steele, 136 Mo. 327,

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334. (2) If there was any evidence tending to show defendant's connection with plaintiff's injury, it was in the shape of alleged admissions which were made by one Stephens and others. The "admissions" of these alleged representatives were certainly inadmissible, because there was no proof of their agency beyond their own statements; there was no evidence that they had any authority to make such admissions. Mechem on Agency, sec. 100; Craighead v. Wells, 21 Mo. 404, 409, 410; Farrar v. Kramer, 5 Mo. App. 167, 171; Winter v. Railway, 73 Mo. App. 173, 178, 180; Adams v. Railroad, 74 Mo. 553, 556; Ladd v. Couzins, 35 Mo. 513, 516; McDermott v. Railroad, 73 Mo. 516; Aldridge's Adm'r v. Midland, etc., Co., 78 Mo. 559; Corrister v. Railway, 25 Mo. App. 619; Bevis v. Railway, 26 Mo. App. 19, 21, 22; Midland, etc., Co. v. Kreeger, 52 Mo. App. 418, 422; Railroad v. Belliwith, 83 Fed. Rep. 437, 443; Costigan v. Michael, etc., Co., 38 Mo. App. 219, 225, 228. (3) But in our opinion the most palpable error was the giving of the instruction asked by plaintiff. It assumed that said poles were defendant's. State v. Miller, 111 Mo. 542, 551, 552; Thompson v. Botts, 8 Mo. 710, 712; Merritt v. Given, 34 Mo. 98; Moffatt v. Conklin, 35 Mo. 453, 456, 457; Peck v. Ritchey, 66 Mo. 114, 121; Comer v. Taylor, 82 Mo. 341, 347, 348; Wilkerson v. Thompson, 82 Mo. 317, 327, 328; State v. Hecox, 83 Mo. 531, 538; Maxwell v. Railroad, 85 Mo. 95, 105; Bank v. Crandall, 87 Mo. 208, 213; Matthews v. Railway, 26 Mo. App. 75, 89, 91; Krider v. Milner, 99 Mo. 145, 149; State v. Taylor, 111 Mo. 538, 541; Patterson v. Railroad, 47 Mo. App. 570; Jacquin v. Railway, 57 Mo. App. 320, 338; Turner v. Loler, 34 Mo. 461.

H. S. Booth, *J. L. Stephens*, *Rhodes Clay* and *W. W. Fry* for respondent.

(1) In actions at law the appellate court will not reverse on the weight of evidence. Bray v. Kremp, 113 Mo. 552.

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This is true though the defendant offered no evidence. Schroeder v. Railroad, 108 Mo. 322; Gregory v. Chambers, 78 Mo. 298; O'Hara v. Iron & Foundry Co., 66 Mo. App. 53; Inferential evidence is sufficient to sustain a verdict when there is no direct evidence to the contrary. Matney v. Railroad, 30 Mo. App. 507; Breen v. Cooperage Co., 50 Mo. App. 202; Harned v. Railroad, 51 Mo. App. 482. It is not sufficient that the evidence should be weak. It is only when there is a complete failure of evidence. Routsong v. Railroad, 45 Mo. 236; Moody v. Deutsch, 85 Mo. 345; Higgins v. Railroad, 43 Mo. App. 547. (2) An agent is a competent witness to prove his own agency. Crothers v. Acock, 43 Mo. App. 318. The authority of an agent need not be proved by an express contract but may be proved by the habit and course of business of the principal. Brooks v. Jameson, 55 Mo. 505; Mitchum v. Dunlap, 98 Mo. 421. Evidence of the sign at the office and defendant's use of envelopes and stationery of the defendant was evidence of its ownership of the line. McLachlin v. Barker, 64 Mo. App. 511; Hatten v. Randall, 48 Mo. App. 207; Larson v. Railway, 110 Mo. 235; Green v. Railroad, 128 Mass. 221; Thompson v. Railroad, 59 Mo. App. 40; Bank v. Williams, 46 Mo. 17; Western Ass'n v. Kribben, 48 Mo. 37; Hampton v. Pullman Co., 42 Mo. App. 134; O'Hare v. Railroad, 95 Mo. 662; Waller v. Railroad, 83 Mo. 608; Perry v. Ford, 17 Mo. App. 212; Moore v. Gaus, 113 Mo. 111. (3) When it appears that the injury occurred on the telegraph line used by defendant, it will be presumed that the accident arose from the want of proper care, in absence of explanation by defendant. Minster v. Railway, 53 Mo. App. 282; Walsh v. Railway, 102 Mo. 582; Moling v. Barnard, 65 Mo. App. 604. (4) We insist the plaintiff's instruction is not subject to the objection stated.

GILL, J.—On the eighth day of October, 1898, plaintiff, while driving a one horse buggy from his home north of Cen-

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tralia into the town, passed under certain telegraph wires stretched on poles. Just as he reached that point some workmen, engaged in taking out some wires and putting in new ones cut loose a wire from the top of a pole, it fell with a loud, rattling noise to the ground, and in front of plaintiff's horse, causing the animal to turn suddenly in the road overturning the buggy and throwing plaintiff violently to the ground, severely injuring him. For the damages so sustained this action was brought, resulting in a verdict and judgment for $1,000 in plaintiff's favor, and defendant appealed.

I. The defendant's main contention on this appeal is, that there was no evidence that the telegraph lines where the injury was inflicted belonged to the defendant. We think the contention is without substantial merit. Although there was no direct proof that the Western Union Telegraph Company erected the poles and stretched the wires, yet the undisputed facts and circumstances all show that the line was in the possession of and used by the defendant; that the wires ran into and out of an office at Centralia, where the sign of the Western Union was placed, and where defendant's operator and agent received messages for transmission and delivery, and that all such messages were written on the usual blanks of the company. There was also evidence to the effect that the attorney and agent of the plaintiff went to the general offices of defendant at St. Louis, presented the demand of his client, and defendant's claim agent there did not deny defendant's ownership of the line where plaintiff was injured and that defendant's servants committed the act, but objected to the claim because for too large an amount. But even if we exclude this last item of evidence because of defendant's contention that it related to negotiations for compromise and there is yet other and abundant proof of the facts necessary to charge defendant as the owner of the telegraph wires, and that the workmen there engaged were its employees. And the further fact appearing that defendant at the trial did not introduce any

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evidence whatever to the contrary, nor bring forward any evidence at all, such conduct, to say the least, adds strength to this conclusion. If the telegraph line was not its own, and the parties there working were not in its employ the proof was within its easy reach.

II. Further objection is made as to the one and only instruction given. It reads as follows: "The court instructs the jury that if you find from the evidence that on October 8, 1898, the defendant caused or permitted a wire to become detached from its telegraph poles and fall across a road or street coming under its said line of telegraph wire and poles at Centralia, Missouri, and that said wire became detached and fell across said road through the carelessness and negligence of defendant or its employees, and that the same, by the negligence or carelessness of defendant or its employees, frightened and caused plaintiff's horse to run off while attached to plaintiff's buggy, while being driven by plaintiff, and plaintiff was, by reason thereof, injured and damaged, without any negligence on plaintiff's part, then your verdict should be for the plaintiff for such damage as you may believe from the evidence he has suffered, not exceeding fifteen hundred ($1,500) dollars."

It is contended that this instruction improperly assumed that the wire and poles at Centralia were the defendant's property whereas this was an issue raised by the pleadings and should have been submitted to the jury. Conceding that the instruction was somewhat at fault in phraseology, we do not think it seriously defective, or that the jury would probably understand the court as declaring that the telegraph line belonged to the defendant. At all events we do not regard the giving of this instruction as an error "materially affecting the merits of the action," and it therefore should not work a reversal of the judgment. R. S. 1889, sec. 2303. For as the evidence stands on this record it is quite conclusively shown that defendant was the owner of the telegraph line in

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question, and it would then be trifling with justice to send the case back for so trivial an error as is complained of in the above instruction. An examination of this record discloses a clear and meritorious case for the plaintiff and the judgment should be affirmed. The other judges concurring, it is so ordered.

JOHN P. NAYLOR, Respondent, v. E. H. CHINN, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Forcible Entry and Detainer:** DESCRIPTION. A description in an action of forcible entry and detainer by which the premises can be accurately located, is sufficient, and great strictness and accuracy are not essential.

2. ——: COMPLAINT: VERIFICATION: WAIVER. The verification of a complaint in an action of forcible entry and detainer is held sufficient; beside, any defect was waived by a failure to object in the trial court.

3. ——: EVIDENCE: BOUNDARIES OF LAND: DEED. What are the boundaries of land conveyed by a deed, is a question of law; where are the boundaries, is a question of fact; and in an action of forcible entry and detainer it is not common error to refuse the admission of a deed that has nothing to do with the land in dispute.

4. ——: INSTRUCTIONS. Instructions, though unnecessarily numerous and lengthy, fairly submit the case to the jury.

5. ——: JURY: MOTION IN ARREST. The motion in arrest is necessary to raise the question that a jury consisted of six instead of twelve men where the appellant takes no exception during a trial.

6. ——: JUDGMENT: DESCRIPTION. A judgment in forcible entry and detainer should describe the land.

Appeal from the Howard Circuit Court.—*Hon. J. A. Hockaday*, Judge.

AFFIRMED AND REMANDED (*with directions*).

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J. W. Jamison and *W. M. Williams* for appellant.

(1) The description of the premises contained in the complaint is too indefinite and uncertain. The complaint must describe the land with sufficient definiteness to enable an officer, charged with the execution of a writ of restitution, to find the property. Livingston Co. v. Morris, 71 Mo. 603; Benne v. Miller, 50 S. W. Rep. 829; Thiemann v. Meier, 25 Mo. App. 306; Elliott v. Abell, 39 Mo. App. 346. (2) The statute requires the complaint to be verified by the plaintiff, or his agent or attorney. 2 R. S. 1889, p. 1241, sec. 5092; A complaint not verified is void and gives the justice no jurisdiction. Fletcher v. Keyte, 66 Mo. 285. (3) The court committed error in permitting the plaintiff to testify that the deed embraced the land in dispute. St. Louis v. Meyer, 13 Mo. App. 367; s. c., 87 Mo. 276. (4) The judgment is clearly erroneous. It describes no land whatever. It does not even refer to that attempted to be set forth in the complaint. The writ of restitution must follow the judgment, and, in this case, the officer would have nothing whatever to guide him. Benne v. Miller, 50 S. W. Rep. 829; Thiemann v. Meier, 25 Mo. App. 306; Livingston Co. v. Morris, 71 Mo. 603. (5) It further appears that the case was tried by a jury of six. There is nothing in the record to show that this was done by the consent of the parties, as is required by the statute. Cox v. Moss, 53 Mo. 432.

Major & Pritchett for respondent.

(1) The description is definite and certain, as certain as it could well be made and certain and definite enough to enable it to be located. Great strictness and accuracy of description are not essential in complaints in forcible entry and detainer cases as a class. Silvey v. Summer, 61 Mo. 253; Walker v. Harper, 33 Mo. 592; Tipton v. Swayne, 4 Mo. 98;

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McKinney v. Harral, 31 Mo. App. 41; State v. Vansickle, 57 Mo. App. 611. If there was any uncertainty it was certainly cured by the evidence. McPike v. Allman, 53 Mo. 551; State v. Vansickle, 57 Mo. App. 611. (2) The verification of the affidavit is certainly sufficient. Wiltshire v. Triplett, 71 Mo. App. 332; Dean v. Trax, 67 Mo. App. 517. (3) No error was committed by the court in allowing the plaintiff to testify that the deed mentioned in appellant's third assignment of error embraced the land in dispute. St. Louis v. Meyer, 13 Mo. App. 367; Mulherin v. Simpson, 124 Mo. 610. (4) The judgment is sufficient. (5) The last assignment of error comes too late. Vaughn v. Scade, 30 Mo. 600; Brown v. Railroad, 37 Mo. 298; Scott v. Russell, 39 Mo. 407; Brown v. Railroad, 69 Mo. App. 421; Cox v. Moss, 53 Mo. 432.

GILL, J.—This is an action of forcible entry and detainer, the purpose of which is to recover the possession of certain low land or accretion on the Missouri river. The case originated in a justice's court, was taken by appeal to the circuit court, where, on a trial by jury, plaintiff recovered, and defendant appealed.

I. It is first objected that the description of the land contained in the complaint is too indefinite and uncertain. We think there is no merit in this objection. The property sought to be recovered is unsurveyed land formed first into an island on the river and thence growing out to the main land. It was thus described with reference to other adjoining property referred to by well known descriptions: "A tract of land lying southeast of the original Naylor Island, south of the land conveyed by John W. White to E. H. Chinn, and being the same tract or piece of land conveyed by John Payton and May White to John P. Naylor, containing twenty-five acres more or less, all in Howard county, Missouri." This was about as complete and definite a description as was possible under the circumstances, and the proof shows that it could be

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accurately located by such description. This is all that was necessary. "Great strictness and accuracy in these complaints has not been deemed essential." Silvey v. Summer, 61 Mo. 253; Tipton v. Swayne, 4 Mo. 98; State v. Vansickle, 57 Mo. App. 611.

II. It is next objected that the verification affixed to the complaint is not what the statute requires. The complaint was signed, "John P. Naylor, by B. White, his agent and attorney." And then follows: "Subscribed and sworn to before me this 5th day of October, 1898. J. R. Champion, Justice of the Peace."

The statute (section 5092), requires the complaint to be made to any justice of the peace of the proper county, and that it "shall be made in writing, signed by the party aggrieved, his agent or attorney, and sworn to." We fail now to see wherein the above verification is deficient. The complaint appears to have been signed by the attorney of the plaintiff and to have been sworn to by the party subscribing to the paper. This fills the demand of the statute. But even if we concede the verification to be irregular or imperfect, the defendant can not now be heard to complain because he failed to make any such objection in the lower court. Wiltshire v. Triplett, 71 Mo. App. 332. While the case was in the lower court, the plaintiff, on objection made to the sufficiency of the affidavit, might have amended it. The defendant then will not be allowed to pass over the irregularity there and raise an objection for the first time in this court. Dean v. Trax, 67 Mo. App. 517.

III. The third and fourth assignments of error are also without merit. It was not error to permit the plaintiff to testify that the land in dispute was embraced in the deed he procured from other parties, for as was said in City of St. Louis v. Meyer, 13 Mo. App. loc. cit. 382, "what are the boundaries of land conveyed by a deed is a question of law; where the boundaries are is a question of fact." And as to the court's

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action in refusing defendant's offer to read in evidence the deed from John White to himself, there was no error, for the evidence clearly shows that said deed had nothing to do with the land in dispute. Defendant testified that he procured a deed from White covering the land in controversy but was unable to find it, and did not therefore have it present at the trial.

IV. As to the propriety of the instructions given little need be said. The court gave all that were asked by both parties, and the only objection that can be reasonably made thereto is that they were unnecessarily numerous and lengthy. When however these instructions are all read together as one charge, they fairly present the entire case.

V. If defendant desired to raise the point here that the cause was improperly tried before a jury of six instead of twelve men he should have made his objection in a motion in arrest. Since then he failed so to do he can not now complain. Even then, though the defendant was entitled to a jury of twelve men, yet "if the trial proceeds with a less number, and he takes no exception on that ground he can not afterwards avail himself of the error except by motion in arrest of judgment." Vaughn v. Scade, 30 Mo. 600.

VI. The judgment, however, as entered by the court below, is not in proper form. It fails to set out or describe the land, the possession of which is to be restored to plaintiff. The judgment then on the merits will be affirmed, but the cause will be remanded so that a proper judgment *nunc pro tunc* may be entered. The costs of this appeal will be equally divided between the parties. All concur.

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WILLIAM YOUNG, Respondent, v. OMAHA, KANSAS CITY & EASTERN RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

Appellate Practice: EVIDENCE: EMPLOYMENT AND PAYMENT: INSTRUCTION: VERDICT. Where the evidence is conflicting and the issues relating to employment and payment are submitted on proper instructions, the verdict must end the controversy.

Appeal from the Sullivan Circuit Court.—*Hon. W. W. Rucker*, Judge.

AFFIRMED.

J. M. Winters and *J. G. Trimble* for appellant.

(1) It was error to give plaintiff's first instruction for the reason that there was no evidence to justify it. An instruction not based on evidence in the case is erroneous. This point needs no citation of authorities. (2) The court should not have let the case go to the jury; but after doing so, appellant's motion for new trial should have been sustained for the reason that the verdict is in direct conflict with the whole evidence in the case, and could be the result only of prejudice on the part of the jury. (3) The court should have given the peremptory instruction to find for defendant, asked by appellant at the close of all the evidence. The evidence taken as a whole shows two things satisfactorily to all fair minds: (1) That respondent was not in the employ of the appellant but in that of the Missouri Railway Construction Company; and (2) that he has been paid all that was due him.

Calfee, Swanger & Calfee for respondent.

(1) Plaintiff's first instruction correctly declared the law applicable to the evidence in the case. The authority of the

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agent need not be proved by an express contract of agency; it may be proved by the habit and course of business of the principal. Mitchum v. Dunlap, 98 Mo. 418; Franklin v. Ins. Co., 52 Mo. 461; Brooks v. Jameson, 55 Mo. 505; Hoppe v. Saylor, 53 Mo. App. 4; Hull v. Jones, 69 Mo. 587. (2) Appellant says that respondent was not in its employ but in that of the Missouri Railway Construction Company; that it is not the owner of the roundhouse, but only a lessee, and that it had nothing to do with its construction. These contentions are not supported by the evidence. Johnson v. Hurley, 115 Mo. 513; Rice v. Groffman, 56 Mo. 434; Summerville v. Railroad, 62 Mo. 391. (3) The question of payment was a question of fact for the jury, and their finding will not be disturbed by this court. Henry v. Bell, 75 Mo. 194; Waddell v. Williams, 50 Mo. 216.

GILL, J.—The defendant has appealed from a judgment of eighteen dollars which the plaintiff recovered against it on account of work done at defendant's roundhouse in the city of Milan from February 8 to 14, 1898—six days and six nights.

The question is whether or not the trial court erred in sending the case to the jury—it being defendant's contention that there was no evidence to justify a verdict against it.

After examining the record and the evidence brought out at the trial, we feel constrained to let the judgment stand. That the plaintiff did the work, and that it was reasonably worth the amount charged, is not disputed. But for defendant it is insisted that the services performed were for and on account of another corporation or company; that plaintiff was not in the employ of defendant, but in that of the so-called "Missouri Railway Construction Company," who in fact had paid the plaintiff in full for the work.

It seems that in the summer of 1897 the citizens of Milan raised a sum of money by subscription to build a roundhouse

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at that point, thereby inducing the defendant company to make that a division point in the operation of its road. This fund was accepted by the defendant and used for that purpose, but it proved inadequate. The defendant's evidence tends to prove that additional funds were then procured from or through the Missouri Railway Construction Company to finish the improvement. Plaintiff's claim is for services performed about the time of completing the job, and defendant insists that at that time it had nothing to do with the work, but that the same was under the entire supervision and control of said construction company, that all workmen were at that time under the employment of the construction company and that the defendant was under no obligation to them. And while defendant introduced evidence tending to prove this state of facts, yet in behalf of the plaintiff it was shown that his engagement was with the defendant railway corporation and that he never heard of said construction company until the controversy came into court. Plaintiff's evidence tended to prove that he did the work pursuant to a contract of hiring between himself and the company's authorized agent in charge.

The issue thus squarely made between the parties was fairly submitted to the triers of the facts and was by them decided in plaintiff's favor. This then must end the controversy. And as to the question of payment, this too was fairly submitted on conflicting evidence and on a proper instruction.

We discover no reason for disturbing the judgment and it will therefore be affirmed. All concur.

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JAMES F. PITT, Respondent, v. THOMAS DANIEL, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Trespass:** PLEADING: TREBLE DAMAGES: COMMON LAW. A complaint for trespass alleging that the defendant without leave entered, etc., and carried away, etc., states an action at common law and not under the statute since it omits the allegations that the defendant had no "interest in the goods" and that he entered upon land "not his own," and it is error to treble the damages on the verdict.

2. ———: EVIDENCE: INTENTIONAL WRONG. In an action of trespass under the statute for treble damages, evidence tending to show that the alleged trespass was committed under belief of right is admissible not to defeat a recovery but for the consideration of the court on the trebling of damages.

3. ———: ROAD OVERSEER: EVIDENCE. While a road overseer may take stones out of the road for its repair and call persons to his aid for that purpose, neither he nor his hands can appropriate such stones to private use; but a hand sued in trespass for the appropriation of such stone may show in evidence the order of the overseer to prevent the trebling of damages by the court under the statute.

Appeal from the Platte Circuit Court.—*Hon. W. S. Herndon*, Judge.

Reversed and remanded (*with directions*).

George W. Day and *Francis M. Wilson* for appellant.

(1) In actions to recover treble damages, under section 8675, Revised Statutes, the trial court must not ignore, either in the reception of evidence or the giving of instructions, the provision of section 8678; and if it does, and then enters judgment for treble the damage, it will be error. Holliday v. Jackson, 21 Mo. App. 660; Austin v. Coal & Mining Co., 72 Mo. 535, 547; Schmidt v. Densmore, 42 Mo. 225; Lindell v. Railroad, 36 Mo. 545. (2) Owing to the highly penal

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character of this action, the same rules apply as if defendant stood charged with the crime of trespass, and "the statute was never intended to apply to a case like this, punishing a party criminally for acting upon a mistaken view of his legal rights." State v. Newkirk, 49 Mo. 85.

John W. Coots for respondent.

(1) Defendant knew the road overseer was not the owner. He applied to that official in his official capacity, and undertook to determine as a matter of law that a license from him was sufficient. Nothing can be proved to show probable cause which if true would not constitute a complete defense. No state of facts which the defendant must know would not constitute him the owner, will give him probable cause to believe that he is the owner. Rousey v. Wood, 57 Mo. App. 650; Ray v. Thompson, 26 Mo. App. 431.

SMITH, P. J.—This is an action of trespass. The petition alleged that the plaintiff was the owner of a certain quarter section of land and that the defendant, "without leave entered upon said premises and dug up and carried away stone of the value, etc., to his damage, etc.," wherefore plaintiff prays judgment, "as in such cases by statute provided." The answer was a general denial. There was a trial by jury, which resulted in a verdict for plaintiff for fifty ($50) dollars. The court, on the motion of plaintiff trebled the damages and gave judgment accordingly; and the defendant appealed.

The complaint of the defendant is of the action of the trial court in trebling the damages. If the action of the court in that behalf was proper the judgment must stand; if not, it must be reversed. Does the petition state a cause of action based on section 8675 Revised Statutes, as amended by act of 1893 (Sess. Acts, 1893, p. 264), or at common law? If the former, the amount of the verdict was rightly trebled; and if the latter, it was not.

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Said section 8675 provides that, if any person shall carry away any stone, etc., in which he has no interest or right, being on land not his own, he shall pay to the party injured treble the value of the thing so carried away. The petition here does not allege that the defendant had no interest or right in the thing carried away; nor that it was on land not his own. But a reference is made to the statute in the prayer for judgment. No facts are stated in the body of the petition which indicates that the pleader intended to state a cause of action on the statute. A common law action is stated, with a prayer for judgment under the statute.

Walther v. Warner, 26 Mo. 143, was where the petition stated a cause of action on the statute, but made no reference to the statute in the conclusion or prayer for judgment. The circuit court refused to treble the amount of the verdict and this ruling was sustained by the reviewing court. Judge Napton, in delivering the opinion of the court in the case, took occasion to say that the "general scope and object of the new code is certainly to do away with mere formalities, but at the same time it is very far from the purpose of this law to encourage or tolerate general, indefinite and vague allegations. The spirit of this code is to make pleadings more special than before. The plaintiff is required to state his cause of action and the relief to which he supposes himself entitled, so that the adverse party and the court may know with certainty what he complains of and what relief he wants."

In Lowe v. Harrison, 8 Mo. 351, the declaration contained two counts at common law and two that concluded *contra formam statuti.* The allegations of all the counts were the same, except two of them in the conclusion referred to the statute. Judge Scott, who delivered the opinion, remarked: "Should not the plaintiff have employed in his declaration the words used in the act, in order to bring the offense within its terms, viz.: That the defendant had no interest or right in the property taken away, and that it was on land not his own?

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If these words are discarded in declarations under the statute, then the only difference between a statutory count and one at common law is, that the one concludes *contra formam statuti* and the other does not." In Hewitt v. Harvey, 46 Mo. 368, where the petition stated that the defendant, without leave, entered upon land of which plaintiff was owner and cut down and carried away trees growing thereon, of the value of $400, whereby plaintiff was damaged $500, and prayed for $1,500, three times the amount, Judge Wagner said, that, "under the code the plaintiff is required to state his cause of action in plain and precise terms, so that there can be no misapprehension as to what he complains of and what relief he demands. The petition does not state that the defendant had no right or interest in the timber cut and carried away, nor that it was taken from land not his own. No facts are stated which, according to the rules of good pleading, bring the case within the provisions of the statute. The petition is sufficient to give a common law right of action, but is not good under the statute."

Kennayde v. Railway, 45 Mo. 255, was an action based on what is commonly called the "Double Damage Act," where all the facts essential to support the action were alleged, but no reference was made to the statute itself. It was held that as the petition set forth the facts which constituted a statutory cause of action, and appeared to have been expressly framed on the statute, it was sufficient without referring to the statute. White v. Maxey, 64 Mo. 552, was where the petition stated facts which brought the case within the second section of the "Damage Act," but made no reference to it.

It was said that the first three of the cases hereinbefore referred to are not considered irreconcilable with Kennayde v. Railway, *supra*, for the former were actions for penalties claimed under special statutory provisions where some reference must be made to the statute, for without which no such claim could be made; but in the Kennayde case and the one

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then before the court the statute gave a cause of action to parties who, by the common law, did not have it, and in such cases it was unnecessary to make any special reference or any reference at all to the statute.

In Reynolds v. Railway, 85 Mo. 90, it is decided that a party deserving to avail himself of the provisions of a public act is only required to state the facts which bring his case clearly within it. And so it has been held that where a party asserts and founds a right to recover upon a city ordinance he shall plead the ordinance. Givens v. Van Studdiford, 86 Mo. 149. Section 2087, Revised Statutes, provides that, it shall not be necessary to plead any public statute, but it shall be sufficient to allege the act was done by authority of the statute, or contrary to the provisions thereof, naming the subject-matter of such statute, or to refer thereto in some general terms with convenient certainty. The petition here, as has been seen, does not state facts which bring the plaintiff's case within section 8675, Revised Statutes, but, in the conclusion a reference is made to the statute in general terms, but not with convenient certainty.

No case has been found in this state wherein a recovery of a penalty has been permitted under this, or any similar statute, where the petition did not state the necessary facts to bring the case within the statute, or where it stated an action at common law and referred only generally to the statute in the prayer thereof. In actions on statutes so highly penal as this, it seems to us that the plaintiff in his petition should state the facts bringing his case within the statute and not content himself with the mere statement of a common law trespass and a bare reference generally to the statute. For these reasons we think the petition was insufficient to justify the court in trebling the amount of the general verdict found by the jury.

But there is still another equally potent reason why the judgment for treble damages can not be upheld. Section

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8678, Revised Statutes, provides that, in the trial of any action brought on the statute, if it shall appear that the defendant had probable cause to believe the land on which the trespass was committed, or the thing taken or carried away, was his own, the plaintiff shall only recover single damages. The statute just referred to clearly recognizes the distinction between acts of unintentional and acts of intentional and flagrant wrong. Austin v. Mining Co., 72 Mo. 535; Schmidt v. Densmore, 42 Mo. 225; Holliday v. Jackson, 21 Mo. App. 660.

To show that he had probable cause to believe the property taken was his own, and that he was guilty of no intentional and flagrant wrong in removing the stone from the plaintiff's land, the defendant offered to prove that the stone were taken out of a certain public road, at a point where it runs over plaintiff's land, under the authority and direction of the road overseer in charge thereof; that the road at that place was greatly out of repair, and that by removing therefrom a ledge of stone the grade thereof would be reduced, and that it would be thereby greatly improved.

He also offered to prove by the county surveyor that the excavation was made within the limits of the public road. Now, we must assume that the plaintiff was able to make good his rejected offer. This proffered evidence tended to prove a fact which he was required to establish under the statute in order to relieve himself of the penalty it prescribes.

The road overseers of the state within their respective districts are charged with the duty of keeping the public roads in repair. R. S., sec. 7807. In the performance of this duty they may call upon persons in their districts to perform the work. It is true, that while a road overseer may take stone and other material from the roadway, under certain circumstances, for public use, without compensation, yet he can not appropriate the same for private use without liability. But if this evidence shows that the defendant in good faith removed the stone under the direction of the road overseer, supposing

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that the latter had authority to give such direction, no reason is seen why it does not tend to disprove an intent on his part to perpetrate a flagrant wrong on the property rights of the plaintiff.

We can very well see how any one not versed in the law might well make the mistake of supposing that a road overseer had the requisite authority to dispose of the material taken out of the roadway, and not needed for use in repairing the road, in any way he saw fit. Defendant doubtless supposed that his labor in removing the stone and improving the roadway was a sufficient recompense to entitle him to the stone. Can it be said, under such circumstances, that the defendant was guilty of an intentional trespass, or that he had no probable cause to believe the stone so removed was not his own? It certainly can not be the law that a man acting in good faith under such conditions would be held guilty of an intentional and flagrant trespass. He would, of course, be liable for single damages but not for the statutory penalty.

Evidence of the kind rejected should, we think, have been admitted; not for the consideration of the jury, but, rather, for that of the court in determining whether or not the value of the property found by the verdict should be trebled by it. Rousey v. Wood, 57 Mo. App. 650, has no application to this case, as will appear by reference to it.

We think it is settled in this state by the cases cited in the brief of the defendant that in actions of trespass under the statute any evidence is admissible which tends to prove that the defendant had reasonable ground to believe the property taken was his own, and therefore he was guilty of no intentional wrong, justifying the infliction of the harsh penalty of the statute. Such evidence does not go to defeat the entire recovery, but is for the consideration of the court in determining whether the amount found by the jury shall be trebled. Walther v. Warner, *supra.*

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No error is perceived in the action of the court in respect to the giving or refusing of instructions.

The judgment must be reversed and cause remanded, with leave to plaintiff to amend his petition if he elect so to do. All concur.

JOHN E. COMPTON, Respondent, v. OMAHA, KANSAS CITY & EASTERN RAILWAY COMPANY, Appellant.

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86	149
86	150
86	434
86	435
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Kansas City Court of Appeals, December 4, 1899.

1. **Master and Servant:** ASSUMPTION OF RISK: DEFECTS V. RISK: PLEADING: JURY QUESTION. The mere allegation in his petition that the servant knew the defects in a hand car will not render the petition insufficient without the further allegation that he knew the risk attending such defects; and in such case the assumption of risk or contributory negligence is a question of fact to be determined by the jury.

2. ———: DEFECT IN MACHINERY: INSTRUCTION: EVIDENCE. Evidence is reviewed and held to warrant an instruction submitting the issue whether the hand car left the track because the wheels thereof would not track.

Appeal from the Adair Circuit Court.—*Hon. N. M. Shelton*, Judge.

AFFIRMED.

F. M. Harrington and *J. G. Trimble* for appellant.

(1) The objection to the introduction of any evidence should have been sustained, for the reason that plaintiff admits in his petition that he had been using the car for about four weeks and knew its defects (if any there were). He pleads his inexperience, but that will not excuse him. Four weeks' experience on a car, the wheels of which were not lined up, would not track and would not stay in proper place, but climbed the rail, would give any man information enough to

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know such a car was dangerously defective, and his plea of want of knowledge of the dangerous character of the defects is overcome by the presumption that he is not an idiot. Thompson v. Railroad, 2 Mo. App. 633; Ruchinsky v. French, 1 Am. Neg. Rep. (Mass.) 620. (2) Plaintiff's first instruction is erroneous for the reason that there is no evidence that the failure of the wheels to track, or their not being lined up, in any way caused the derailment. The testimony shows one wheel a little sprung—a slight variation. The others were true. Which one left the track is not shown. From the way the car turned when it was derailed, it is evident that the front wheel on the left-hand side left the rail first. Whether that was the wheel slightly out of line, is not shown. If it were not the defective one, the variation had nothing to do with the derailment. (3) He was fully cognizant of all the dangers, and under the law as declared in case of Epperson v. Postal Tel. Co., 50 S. W. Rep. 795, and by this court in Thompson v. Railroad, 2 Mo. App. 633, the case should be reversed and judgment entered for defendant.

P. F. Greenwood for respondent.

(1) Respondent submits that the evidence in this case shows he was without experience in using a hand car. And, although he may have known that the defect made the hand car more dangerous to use, yet all the evidence shows the section foreman and all the section hands believed they could use this hand car by the exercise of ordinary care and caution. The defendant tried the case on the theory that it was safe to use it. (2) We submit that where the defect is known by the employee yet the employer can not escape liability to the employee on the grounds of contributory negligence, unless the defect was so obvious and glaring as to deter a prudent person from using the same, and each case is to be determined by the facts surrounding it. Harriman v. Star Co., 81 Mo. App. 124.

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SMITH, P. J.—The defendant, a railroad corporation, employed the plaintiff, a farm hand and common laborer, to work on one of the sections of its railroad track in this state. The plaintiff, before such employment, had had no experience in working on a railroad in any capacity. He was under and subject to the orders of one Swanson, who was foreman of the section on which plaintiff was employed to work. The hand car used on the section by Swanson and the men under him was old and nearly worn-out. The cogs were worn-out and did not fit in well together. They were mashed on top and made the car run hard and, besides this, one of the axles was sprung so that its wheels would not "line up" and would not track. It was found that when the car was set off on the station platform and moved along the wheels did not track by at least an inch. When moved on the track the wheels were inclined to climb the rails and run on top of them instead of staying down on them, as they ought to have done.

On the day the plaintiff was hurt, which was twenty- one days after he had entered the defendant's service, he and two other section hands were directed by the foreman to take the car and go east some distance on the defendant's railroad track to a tie pile and fetch therefrom a load of ties; and on their way thither, while going down a slight grade and approaching a railroad bridge, the car suddenly jumped the track, throwing the plaintiff off with such force and violence as to seriously injure him. This suit was brought by him against the defendant to recover damages for the injuries so received.

The petition alleged that the said hand car, furnished by defendant to the foreman to be used by him and his section hands, was, at the time of the plaintiff's injury, and for a long time prior thereto, greatly out of repair, defective and unsafe for use (specifying in what particulars) which was known to

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defendant, or by the exercise of ordinary care might have been known to it; that plaintiff knew the car was defective and not in good repair, but did not know, with his limited and short experience, that it would cause it (the car) to jump the track, but believed that, by the use of ordinary care, it could be used with safety in the performance of the work in which he was engaged; that while in the exercise of ordinary care in running the car on said railroad track, by reason of its defective and unsafe condition, it jumped off the track and threw the plaintiff with great force and violence onto a railroad bridge, and by reason of the momentum thereof, the plaintiff's spine, back, head, shoulders, lungs and hip were greatly injured, etc. The answer was assumption of the risk and contributory negligence by the plaintiff. There was a trial and judgment for plaintiff. Defendant appealed.

The defendant challenges the sufficiency of the petition. It contends that since it is therein alleged that the plaintiff used the said car twenty-one days before he was hurt, and knew that it was defective, that he must be conclusively presumed to have also known that it was in an unsafe and dangerous condition, and therefore no liability is disclosed. It is true a servant can not rashly or deliberately expose himself to danger which he knows and appreciates and then hold the master liable for damages for injuries sustained by reason of his rash act. But it is one thing to be aware of defects in the instrumentalities furnished by the master for the performance of his services and another to know or appreciate the risks resulting or which may follow from such defects. The mere fact that a servant knows the defect may not charge him with the assumption of the risk, or with contributory negligence.

The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks and not merely the defect, existed? Sullivan v. Railway, 107 Mo. 66. So that it does not logically and inevitably follow, as a necessary legal consequence, that

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because the servant knows of the defect in the instrumentalities placed in his hands by the master for the performance of the work assigned to him that he likewise knows and appreciates the risk resulting from the use of such instrumentalities. Of course, if it had been alleged, as it was not, that the car was so dangerous as to threaten immediate injury, if used, or that it was so glaringly defective that a man of common prudence would not have used it in the performance of the work in which plaintiff was engaged when injured, or that it was not reasonable to suppose that it might not be safely used by the exercise of skill or care, there would be some force in the defendant's contention. If the plaintiff knew of the defects in the car that would not necessarily preclude a recovery. Whether he assumed the risk or was guilty of contributory negligence in using the car in the work required of him was a question of fact to be determined, not by the court from the allegations of the petition but by the jury from such knowledge and other circumstances disclosed by the evidence. This is the result of all the cases in this state. Doyle v. Railway, 140 Mo. 1; Bradley v. Railway, 138 Mo. 305; Holloran v. Foundry Co., 133 Mo. 470; O'Mellia v. Railway, 115 Mo. 205; Mahaney v. Railway, 108 Mo. 191; Huhn v. Railway, 92 Mo. 440; Bullmaster v. St. Joseph, 70 Mo. App. 60; Smith v. Coal Co., 75 Mo. App. 177; Harriman v. Star Co., 81 Mo. App. 124. The defendant's objection to the petition is not therefore well taken.

The defendant next objects that the court erred in its action in giving plaintiff's first instruction. It is not assailed on the ground that abstractly it is erroneous in expression, but, rather, on the ground that there is no evidence on which to base it. It submitted to the jury the issue, whether or not hand car left the track because the wheels thereof would not track, and were not properly lined up, and in consequence of which the plaintiff was injured. There was evidence, as we think, to warrant the submission of this issue. Besides the

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facts hereinbefore stated and shown by the evidence, it further appears that the section foreman himself declared the car unfit for use and had, previous to the accident, requested the road master to furnish another car. It seems to us the facts and circumstances disclosed by the evidence were ample to justify the jury in deducing the inference therefrom that the derailment by which the injury was inflicted was caused by the defective condition of the car.

If the plaintiff was entitled to recover at all, we think that the amount of the verdict was quite moderate and that there is no reasonable ground for complaint on that account.

Discovering no error in the record prejudicial to the defendant on the merits, the judgment will be affirmed. All concur.

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M. J. COVELL, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Negligence:** CONTRIBUTORY NEGLIGENCE: JURY QUESTION. The question of contributory negligence is usually for the jury unless the facts are clear and indisputable and free from conflicts.

2. ———: ———: RAILROAD CROSSING: EVIDENCE: PHYSICAL FACTS. Where the physical facts and the lay of the ground clearly contradict plaintiff's evidence as to his looking and listening, they should govern, but otherwise the question is for the jury.

3. **Evidence:** WHISTLING AT CROSSING: ORDINANCE: CONTRIBUTORY NEGLIGENCE. The plaintiff, injured by a train at a street crossing, may testify that no whistle was sounded, though there was no ordinance or statute requiring whistling. It constitutes part of the *res gestae* and bears on the question of contributory negligence.

4. ———: SPEED OF TRAIN: EXPERT: RES GESTAE. A plaintiff who was injured at a crossing may testify to the speed of the train as a part of the *res gestae* without being an expert.

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5. **Personal Injury**: MEASURE OF DAMAGES: ELEMENTS OF: INSTRUCTION. An instruction on the measure of damages properly mentioned the bodily pain and mental anguish, loss of time and expense, without giving to the jury license to add to these any so-called general damages.

6. ——: DAMAGES: EXCESSIVE. On the facts of this case a verdict for $2,000 is not excessive.

Appeal from the Jackson Circuit Court.—*Hon. E. L. Scarritt*, Judge.

AFFIRMED.

Geo. S. Grover for appellant.

(1) The court admitted incompetent evidence. Welsch v. Railroad, 72 Mo. 451; Field v. Railway, 76 Mo. 614; Muff v. Railroad, 22 Mo. App. 584; Madden v. Railroad, 50 Mo. App. 666; Guffey v. Railroad, 53 Mo. App. 462. (2) The demurrer to the evidence should have been sustained. Payne v. Railroad, 136 Mo. 652. (3) The instructions given by the court, at the plaintiff's request, were erroneous. Jacquin v. Railway, 57 Mo. App. 320. (4) The instructions asked by the defendant should have been given. Authorities cited *supra*. (5) The verdict is excessive. Authorities cited *supra*.

John Burgin for respondent filed a lengthy argument.

GILL, J.—Plaintiff sued defendant for personal injuries inflicted by defendant's employees in backing a train of freight cars over or against him at a point where defendant's tracks cross St. Louis avenue, a street in the west bottoms at Kansas City. On a trial by jury plaintiff had a verdict and judgment for $2,000 and defendant appealed.

On this appeal the main contention is that the court erred in not sustaining a demurrer to the evidence. It becomes

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necessary then to briefly state the facts as they are disclosed by the evidence.

The collision occurred on St. Louis avenue (running east and west) near where the same crosses Mulberry street and about sixty to seventy-five feet east of the east line of the latter. At that point there were four railroad tracks running parallel and crossing St. Louis avenue at an oblique angle from northeast to southwest. These tracks covered about twenty-five feet of the street. The east one belonged to the Wabash road, while the other three were owned and used by the Missouri Pacific and Union Pacific roads. These tracks were used largely by these different roads for switching purposes and making up trains. In the vicinity there were several railroad yards—that of the Wabash being east of the point of accident, that of the Missouri Pacific being west, while others were in the same neighborhood.

The accident occurred at about 5 o'clock on the morning of March 19, 1898. According to the testimony of several witnesses the morning was dark, it had been raining the night before, and the condition of the atmosphere as to fog and smoke was such that one passing along there could not see further than a car's length. According to this testimony also there were no lights, nor watchman at the crossing of the streets or at the crossing of the railroad tracks. At about the hour named the plaintiff came along Mulberry street from the north, driving a one-horse milk wagon. When he came to St. Louis avenue he turned east on that street intending to go up town to deliver milk. He testified that when he got to the west of the four tracks he stopped, looked both ways and listened, but failed to see or hear any locomotive or cars approaching. He then proceeded, driving his wagon at a moderate walk and continually watching both ways for trains. However, just as his horse got upon the track of the Wabash road he suddenly discovered a freight car backing down upon him and running at a rapid rate of speed, estimated

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by the plaintiff at fifteen to twenty miles an hour. He struck and urged his horse forward, but was unable to pass entirely over before the train caught his wagon and threw plaintiff and his horse down under the side of the car, dragged him about two or three car lengths before it could be stopped and plaintiff was thereby severely injured.

At the time of the collision there was an ordinance in Kansas City prohibiting the running of railroad cars or locomotives on or across the streets at a greater rate of speed than six miles an hour; and also an ordinance requiring lighted lamps, lanterns or headlights to be conspicuously placed in front of the locomotives or cars, facing in the direction the same may be moving, whether running forward or backward, at all times between sunset and sunrise. The train in question, it seems, consisted of a switch engine and eleven or twelve cars. It was backing from northeast to southwest, and had no light at the west end as required by the ordinance. And besides the evidence for the plaintiff tended to prove that the train was being moved at a speed in excess of six miles an hour.

I. Assuming now the facts to be as the evidence in plaintiff's behalf tended to prove, it must be conceded that defendant's servants were negligent in handling the train. The testimony in fact makes a case of gross carelessness. These employees were shoving this long train of cars at a rapid and unlawful rate of speed, and through the dark, foggy and smoky morning, across one of the most used thoroughfares of the city, without any light and without any warning whatever. There is little if any dispute as to these facts. But defendant seeks to escape liability on the plea that however negligent the defendant's servants may have been, still the plaintiff was guilty of such contributory negligence as will bar his recovery.

After a careful review of the entire evidence we feel constrained to rule this point against the defendant. As often declared by the courts, the question of contributory negligence is usually one for the determination of the jury. It is only

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when the facts are clear and indisputable that the court is authorized to declare, as matter of law, that plaintiff was negligent and can not recover. The settling of conflicts in the evidence rests, by the law of the land, with the jury, when the case is so tried, and not with the trial judge.

In this case now the testimony of the plaintiff shows, that before attempting to cross these four tracks he stopped, looked both ways and listened for approaching trains, that he neither saw nor heard any, and that then he proceeded on his way, at the same time watching for danger. He discovered nothing until he got upon defendant's track, when he saw the cars backing down at a rapid rate upon him not more than a car's length distant; and that he then made every reasonable effort to escape is clearly shown. That he did stop before attemping to pass over the tracks the plaintiff is also corroborated by one of defendant's witnesses.

But it is contended that the physical facts show that plaintiff did not observe these precautions, did not use his sense of vision, or else would have seen the approaching train in time to have avoided the collision. If the facts or premises, were without question as they are, claimed to exist, then the conclusion contended for would inevitably follow. For it is well settled that even though the plaintiff testifying that he did look and listen before entering upon the crossing, and discovered nothing endangering his passage, yet if the lay of the ground, the course and condition of the tracks and all the surroundings were such, that, looking and listening he must have seen or heard the train in time to have avoided injury, then, notwithstanding plaintiff's testimony the court is authorized to ignore such evidence and direct a verdict for the defendant. It will then be conclusively assumed either that he did not look or listen, or if he did, that he did not heed what he saw or heard. Lien v. Railway, this court but not yet reported, and cases cited. But this record fails to clearly establish the facts upon which this rule rests. It does not

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appear by clear and undoubted proof that by the exercise of these proper precautions the plaintiff could have discovered the approach of the backing train in time to avoid injury. The evidence tends strongly to establish the contrary. As already stated, it tends to prove that because of the darkness and smoky, foggy condition of the atmosphere, the plaintiff could not see and detect the moving of the cars at a distance sufficient to escape collision with a train running at the speed and without lights and other warning, as was this one. According to the testimony even of one of defendants' witnesses it was so dark, foggy and smoky that without an artificial light he was unable to see a man beyond a few feet; and according to the witness Cook, whose testimony is so much relied on by defendant's counsel, he could only see the "dim outline" of the cars from a point of observation at the street corner nearby. It must be borne in mind too that by the preponderance of the evidence it appears that at this particular time the street lights were out, and that defendant had no lighted lamp, lantern or headlight on the end of the car as it was being rapidly pushed across St. Louis avenue. And with reference to plaintiff's ability to hear the train approaching, it is shown by the evidence, and is a matter of common knowledge, that in the west bottoms of Kansas City where the accident occurred there are numerous railroad yards and tracks where trains are continually moving and switching, thereby creating much rumbling noise and confusion. So that even if plaintiff could have seen, or did see "a dim outline" of a car, it would be difficult in the absence of a light or other warning to detect its movements or whether it be in motion at all. All these facts and circumstances which the evidence tended to establish were proper matters for the jury to consider when passing on the question as to whether or not the plaintiff acting as a prudent man could have avoided the collision. It is not the province of this court to ignore these circumstances, conditions of the darkness, fog and smoke testified to, and arbitrarily declare

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that plaintiff could, if he had used his senses, have discovered the train moving down upon him in time to avert the jury. The same remarks are applicable to the testimony of the witness Cook. We have no right to assume that his was the correct version of the affair, and that he alone gave the correct deversion of the affair, and that he alone gave the correct description of the character of the atmosphere, how dark it was and how far he could see the "dim outline" of an approaching train. All these matters, were as they should have been, left to the jury.

In our opinion then the court properly refused to give a peremptory instruction for defendant.

II. We proceed now to notice other matters complained of in defendant's brief:

It is said that the court erred in permitting witnesses to testify that no whistle was sounded as the train approached the crossing. We think this was not error. Conceding that the statute did not require the sounding of the whistle at or before the crossing was reached, still this evidence was proper on the issue of plaintiff's contributory negligence. The same remark may also be made as to the testimony relating to the absence of a light at the street crossing. As was said in Easley v. Railway, 113 Mo. 236: "The evidence referred to was relevant as part of the *res gestae,* and as having a bearing on the issue of plaintiff's alleged contributory negligence." And so again the supreme court has said, in Schmitz v. Railway, 119 Mo. 256, that it was not error "in permitting the witness to testify that no flagman was present at the time of the accident, as this evidence was admissible as tending to show negligence on the part of the defendants and the want of care and caution in order to prevent accidents at this crossing."

It is claimed also that the court erred in allowing the plaintiff to testify in relation to the speed of the train as it approached the crossing. This I suppose is on the theory that before such an opinion was given the witness should be shown

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to be an expert, otherwise the evidence should have been rejected. The supreme court has also fully answered this objection. In Walsh v. Railway, 102 Mo. 582, the rule is said to be "that the rate of speed of moving cars may be shown by the opinion of a witness who saw the cars in motion. Such an objection no more involves a question of science than does an opinion concerning the speed of a horse. One who sees a moving train and possesses a knowledge of time and distance is competent to express an opinion as to the rate of speed at which the train is moving (citing authorities). The opinion of one who has never timed moving cars may not be as reliable as the opinion of one who has had such experience, but that goes to the weight and not to the competency of the evidence."

As to the court's instructions given, but one is complained of, and that relates to the measure of damages. We think the objections urged are without merit. The instruction does nothing more than call the jury's attention to the various elements of damage and which they are authorized to consider. It does not give the jury "a roving commission" to go into the realm of uncertainty. It does not direct the jury, as was done in the Jacquin case (57 Mo. App. 320), first to award such damages in "such sum as they believed from the evidence plaintiff had suffered," and in another and further instruction, or in any other way, authorize the jury to include in addition to such general damages other specific damages. In this case the jury was in effect told, that in estimating the damages they were to consider the several elements, of bodily pain and mental anguish already endured, and such as might with reasonable certainty be experienced in the future together with the loss of time and expenses incurred by plaintiff in consequence of the injury, etc. But there was no language used that would reasonably or probably lead the jury to suppose that these different elements were to be added to any so-called general damages. The instruction complained of is such as is usually given in the trial of such cases and

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such as has been repeatedly approved by the courts, as will be seen by consulting the numerous decisions cited by plaintiff's counsel.

Neither is there any just ground to complain of the amount of damages awarded by the jury. If the evidence is to be credited, and of that the jury is the sole judge, the plaintiff was quite seriously injured. His injuries not only occasioned a present great bodily pain and mental suffering, loss of time and the like, but the evidence tended to prove that said injuries were to an extent permanent and such as to impair the plaintiff's ability to labor. When these injuries are considered we do not think a verdict for $2,000 at all excessive.

The case was fairly tried, the judgment is supported by abundant evidence and will be affirmed. All concur.

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C. W. HILL, Respondent, v. OMAHA, KANSAS CITY & EASTERN RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 4, 1899.

1. **Contracts: THIRD PERSON: INDEMNITY.** A stipulation in a lease by which the lessee agrees to indemnify the lessor against his past acts and omissions, etc., will not sustain an action by a third person against such lessee for the defaults of the lessor, since it is not a contract for the benefit of such third person.

2. **———: CONSIDERATION: ACTION.** A benefit passing to the promisor from the promisee will sustain a contract; and where a lessee of a railroad promised if a party would wait the lessee would pay the damages done his stock by the lessor and the party did wait, the waiting was a sufficient consideration to support the contract and the promisee may maintain an action thereon.

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Appeal from the Sullivan Circuit Court.—*Hon. J. M. Wallenbarger*, Special Judge.

AFFIRMED.

J. M. Winters and *J. G. Trimble* for appellant.

(1) The lease was not a contract for payment of claims against Gilman and Jacobs, but for indemnifying and holding them harmless, and respondent had no right of action against appellant. State v. Railroad, 125 Mo. 596. (2) There was no promise on the part of appellant to pay this claim. If the letter from Mr. Soule can be construed into a promise, there is nothing to show that he had authority to make it, nor was there any consideration for it. Respondent has no right of action against appellant, State v. Railroad, 125 Mo. 596, and his forbearing to enter suit was no consideration to bind appellant for any promise the letter of August 6 might be construed to contain. Pohlman v. Tilden, 44 Mo. App. 569.

Irwin & Hughes and *W. F. Calfee* for respondent presented an argument.

GILL, J.—This is a suit based on section 2611 of our statute to recover double the value of a cow killed on defendant's road. There is practically no dispute as to the main facts. It is conceded that in May, 1897, plaintiff's cow, worth $50, escaped on to the railroad track at a point where the statute required it to be fenced, but which was not, and was there run over by a passing train and killed. The point of dispute is whether or not the defendant is responsible for the damages. In May, 1897, when the cow was killed, the road was being operated by Gilman and Jacobs as trustees under a defaulted mortgage. But in June following, the road was turned over to the defendant under the terms of a written lease, wherein said defendant promised "to indemnify and save harmless the party of the first part * * * and said

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Theodore Gilman and Ward W. Jacobs as trustees under the mortgage * * * from all liability by reason of accidents, injuries or damages occurring out of, or in any way connected with the maintenance and operation of the property hereby demised * * * and to indemnify and save harmless each and all of said persons or corporations, their successors and assigns, from all liability by reason of the same, or by reason of any cause or causes of action for any past acts, omissions, defaults or obligations of any of said parties or persons in connection with said demised property or the operation thereof."

At the time the cow was killed, and subsequently when the road was transferred to the defendant, one Soule was superintendent and it seems acted as well in allowing and settling such claims as that of the plaintiff. The latter applied to Soule for an adjustment of the damages and he promised to look the matter up. Nothing further was done then until in July or August following and after defendant had taken possession of the road. With a view then of forcing a settlement, plaintiff, in July or August following, employed an attorney who wrote demanding that the plaintiff's damages be paid. This letter was addressed to Soule, who continued in the same position as superintendent or claim agent for the defendant as he had been with its predecessor, and said Soule replied by letter to the effect that if Hill, the plaintiff, would wait awhile and not bring suit the defendant would pay the damages. Relying on this promise plaintiff did delay in bringing his suit, but the claim was not settled, and thereupon this action was brought, resulting at a trial by the court without the aid of a jury, in a judgment for $100, double the value of the cow, and from said judgment defendant appealed.

1. The only instruction asked was a demurrer to the evidence and this the court declined to give. The sole question then is, has the finding and judgment of the court any evidence to support it. Or was the plaintiff entitled to recover on any theory of facts which the evidence tended to prove.

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In the statement, we have set out what the evidence tended to prove—construing all conflicts in the testimony favorably to plaintiff, as he is entitled to that in the determination of the case here.

In the light of a decision by the supreme court in State v. Railway, 125 Mo. loc. cit. 617, it seems that plaintiff can not recover on the alleged assumption contained in the lease of the road made to the defendant, wherein defendant agreed to indemnify and save harmless those previously operating the road from all liability for accidents to and claims of third persons. A clause similar to this was under review in the case above cited, and Judge Black, speaking for the court, said: "If the agreement or covenant is simply one to indemnify and save harmless one of the parties to the contract, against the claims of third persons, then such third persons can not sue upon the agreement or covenant. Such a contract, whether under seal or not, is not a contract for the benefit of third persons within the meaning of the rule that where one person makes a promise to another for the benefit of a third person, such third person may sue on the promise."

2. The defendant, however, made through its authorized agent another promise upon which it may be held. Through his attorney, plaintiff demanded a settlement of the damages, and threatened to sue the defendant, or other persons responsible, for killing the cow. Defendant thereupon promised to adjust and pay the damages if plaintiff would withhold action in that respect. Plaintiff did wait but defendant did not comply with its promise. There is no reason why that promise should not be enforced. The agreement was supported by a sufficient consideration. "If the least benefit or advantage be received by the promisor from the promisee, or if the promisee sustain any, the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid." Marks v. Bank, 8 Mo. 317.

The judgment in this case is clearly for the right party and will be affirmed. All concur.

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MICHAEL TORLOTTING, Respondent, v. MINA TORLOTTING, Appellant.

St. Louis Court of Appeals, December 12, 1899.

1. **Divorce: ADULTERY CONNIVED AT: NO DVIORCE: BILL DISMISSED.** Respondent hired as a detective, one White, *alias* Morgan, to furnish him ocular proof of his wife's infidelity. White planned an assignation between himself and respondent's wife, appellant herein, at a certain place and time, and notified respondent that he could in an adjoining room by means of openings in the partition see her commit the act of adultery; he attended, saw and was satisfied: Held, under the circumstances, respondent was consenting to the act of which he complained within the meaning of section 4507, Revised Statutes 1889, and ruled against his having a divorce, reversed the cause, and ordered his bill dismissed.

2. ———: FINDING BY LOWER COURT: NOT CONCLUSIVE. The appellate court will examine the evidence in a divorce suit, for itself and reach its own conclusions, yet when the testimony is oral and conflicting, much deference will be given to the findings of facts by the trial court.

3. ———: CLEAN HANDS: INNOCENT. A party seeking a divorce must, as in a court of equity, come into court with clean hands, he must be both an injured and innocent party.

4. ———: ———: ———: PRINCIPAL BOUND BY AGENT. White was respondent's agent, was hired and not restricted as to the means to employ to compass his object, and was expected to furnish the wanted evidence, which circumstance, under the law of agency, places respondent in the unequivocal attitude of conniving at and consenting to his wife's adulterous act.

5. ———: ———: ———: DISCOVERY. The husband may employ agents to watch his wife for the purpose of discovering whether she is guilty or not, as suspected, and he is only required to permit his wife to proceed far enough in the commission of the act to discover to a certainty her lewd disposition.

Appeal from the St. Louis City Circuit Court.—*Hon. Franklin Ferris*, Judge.

REVERSED (*Bill ordered dismissed.*)

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Martin & Bass for appellant; *H. A. Loevy* of counsel for appellant.

(1) Appellant did not commit adultery. (2) Adultery is a voluntary act of sexual intercourse by a man and a married woman. 1 Am. and Eng. Ency. of Law, 209. If appellant had intercourse with Morgan (which is not admitted), it was while she was under the influence of drugs, administered by him, and therefore, the act was not voluntary on her part, and she can not be held responsible for what occurred. (3) Respondent connived at and procured the intercourse and paid for it. This defeats the assertion of the act as a ground for divorce. Davis v. Davis, 60 Mo. App. 556; 1 R. S. 1889, sec. 4507; Morrison case, 136 Mass. 310; Pierce case, 3 Pick (Mass.) 299; Hadden case, 21 N. J. Eq. 61; Myers case, 41 Barb. N. Y. 114; Gower case, Law Rep., 2 P. & D. 428, 433; Karger case, 19 N. Y. Misc. R. 236; Helmes case, 24 Ib. 125; Dennis case, 68 Conn. 186; Gipps case, 33 L. J., P. M. & A. cases, 163; Crewe case, 3 Hagg. Eccles. 129; Rogers case, Ib. 59, 60; Hoar case, Ib. 137. (4) Where the complaining party in a divorce case is shown to have been guilty of such conduct as would entitle the defendant to a divorce, the petition will be dismissed. Morrison case, 62 Mo. App. 301; Nichols case, 30 Mo. 291; Neff case, 20 Mo. App. 191; Hoffman case, 43 Mo. 550. (5) "If it shall appear to the court that the adultery, or other injury or offense complained of, shall have been occasioned by the collusion of the parties * * * on that the complainant was consenting thereto * * * then no divorce shall be granted." 1 R. S. 1899, p. 1031, sec. 4507. Complainant in this case did consent, not passively, but actively, not only consented from the standpoint of mere acquiescence, but actually procured and paid for the commission of the act he complained of. "For specific causes of marriage relation may be dissolved, but he or she who is instru-

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mental in producing the cause can never avail himself of it." (48 Mo. App. 208, 211; 43 Mo. 547, 551; 26 Mo. 545; 28 Mo. 60; 29 Mo. 301.) Davis v. Davis, 60 Mo. App. 556. "One instance of adultery was proved, but there is reason to think the husband was the case of its being committed. It would be a dangerous principle to establish that a husband who has suspicions of the infidelity of his wife shall be allowed to lay a train which may lead her to the commission of adultery in order that he may take advantage of it to obtain a divorce." Case dismissed. Pierce Case (Ch. J. Barker), 3 Pick. 299. "I desire to state distinctly and broadly that, in my opinion, if a husband employs a man to get evidence of adultery upon which to obtain a divorce and that man so employed sets about to procure the defilement of the wife, and by the intervention of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy for such adultery, even if it were proved that he had not given any distinct orders for that purpose." Gower case, 2 Law Rep. P. & D. 428, 429.

Jesse A. McDonald for respondent.

(1) "Her story as to believing herself in a real estate office, and that she was drugged, I reject entirely. It does not appear that there was any element of temptation, or seduction, or opportunity for the same on the part of Morgan. I am impressed with the belief, from all the evidence, that defendant was ready and willing when she first met Morgan to respond to a criminal invitation from him * * * The law deals with facts, and the charge of adultery in this case must rest upon the act of adultery committed." The evidence sustains this finding and the appellate court may therefore refuse to interfere. Brewing Co. v. Brewing Co., 47 Mo. App. 21; Rawlins v. Rawlins, 102 Mo. 567; Nichols v. Nichols, 39 Mo. App. 294; Owens v. Owens, 48 Mo. App. 212.

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(2) Respondent did not, as contended by appellant, consent to the adultery proved against her. He, on ample grounds, suspected his wife of infidelity and employed detective White to watch her and let him know if she was doing wrong, which he had a right, under the law, to do. Riersen v. Riersen, 52 N. N. Sup. 509; Wilson v. Wilson, 154 Mass. (1891) 194; Welch v. Welch, 50 Mo. App. 398; Robbins v. Robbins, 140 Mass. 541; Moorsen v. Moorsen, 3 Hagg. Eccl. Rep. 87; Phillips v. Phillips, 1 Rob. Eccl. Rep. 160; 2 Bishop on Mar. Div. & Sup. [5 Ed.], sec. 9; St. Paul v. St. Paul, L. R. 1 P. and D. 739; Timmings v. Timmings, 3 Hagg. Eccl. Rep. 81. The appellant's fourth contention for reversal—that respondent is not entitled to a divorce because he was guilty of conduct which would have entitled her to one—was not pleaded, or sustained by the proof, or found as a fact, though all the evidence offered relative thereto was admitted by the trial court. It will be assumed that the court found the fact to the contrary and that proposition may, therefore, be concluded as to this honorable court. Stevenson v. Stevenson, 29 Mo. 95; Miller v. Miller, 14 Mo. App. 428; Owens v. Owens, 48 Mo. App. 212; Nichols v. Nichols, 39 Mo. App. 294. "If the plaintiff consents to, or connives at, or procures the adultery of the defendant, or it is done with his privity, as it is called, then he has no cause of action. The question is, and the question which has been discussed in this case somewhat as a question of law is, what constitutes consent, connivance or privity?" It is practically conceded in this case, at least it is the contention on the part of the defendant's witnesses, that the plaintiff suspected the defendant was about to commit an act of adultery with Gulley. Of course, it follows that he could have prevented it. It is claimed by the defendant that because he could have prevented it, or at any rate, as I understand it under the circumstances of the case, that it amounted to consent, connivance, privity or procurement. The court does not so understand the law, and states it

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differently. In the language of one of the cases: "There is a manifest distinction between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he already believes to have committed adultery and to persist in her adulterous practice whenever she has an opportunity." While the contention of the defendant is supported by the case of Karger v. Karger, 19 Misc. Rep. 236, or 24 N. Y. Supp. 219, yet we think that such case does not announce a sound rule of law upon this subject, inasmuch as it omits to recognize the distinction which was made by the learned trial court in the charge above quoted which has the support of authority in the court of final resort in this state. Pettee v. Pettee, 28 N. Y. Supp. 1067, affirmed without opinion, 148 N. Y. 735. In this regard we might prolong the discussion and show that the rule adopted by the court had been uniformly recognized from the decision in Moorsom v. Moorsom, 3 Hagg. Eccl. Rep. 87, down to the present time, both in England and in this country. * * * In St. Paul v. St. Paul, L. R., 1 P. and D. 739.

BLAND, J.—The suit is for divorce and the custody of two minor children. The ground for divorce, alleged in the petition and relied on at the trial, is that on Friday, October 7, 1898, the defendant met a man at a rooming house on Olive street (in the city of St. Louis, Missouri), and committed adultery with him. The answer is a general denial. At the date of the trial the plaintiff was 58 and the defendant 44 years of age; they had been married for 28 years; had six children, and some grandchildren. A decree of divorce was awarded the plaintiff. Defendant appealed.

The evidence is before us in the form of printed abstracts. The learned circuit judge who tried the cause made the following finding of the facts and statement of the law as applicable to the facts as he found them.

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"Speaking of the evidence generally, and considering the manner, appearance, interest, and sympathies of the witnesses, I think the testimony given on behalf of the plaintiff more reliable in character than that given on behalf of the defendant.

"I find the following facts bearing upon the charge of adultery: For some time prior to October, 1898, plaintiff suspected that his wife was unfaithful to her marriage vows. I find that he had ample grounds for such suspicion. Her conduct with reference to going out against his objections, and refusing explanations to him. Her remarks to others about him, and about other men, repeated to him. The fact that she went to the house of the witness, Mrs. Becker, and engaged a room for herself and a male companion (she did not however, return to occupy the room, although a man called at the appointed time), which fact was communicated by Mrs. Becker to plaintiff. These facts, together with all the facts detailed in evidence, would justify plaintiff's suspicions, if not the actual belief, he entertained that his wife was, in point of fact, unfaithful. The testimony of Mrs. Becker, if true, could point to no other conclusion.

I was impressed with the truthfulness of Mrs. Becker's evidence. Her manner was favorable to this impression. Her weak effort to qualify her identification of defendant, when recalled by defendant for that purpose, strengthened in my mind the force of her original testimony; especially when considered in connection with her cross-examination upon her deposition.

"After acting upon this belief in his wife's infidelity, plaintiff employed a detective, White, by name, to watch defendant and to report to plaintiff any facts which he might discover, and particularly to inform plaintiff, in case he should discover that defendant was going to meet a map for sexual intercourse, in order that plaintiff might obtain ocular proof of the fact. I find that in employing this detective, plaintiff's only purpose was to secure proof of the facts which he believed, or at least

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strongly suspected to exist. There is no evidence tending to show that plaintiff in any way directed this detective as to how he should proceed.

"On October 8, 1898, at about two p. m., White showed plaintiff a letter or note which reads as follows:

"Dear Mr. Morgan: I can not get out to-night. You try and come to-morrow morning.

Yours truly,

(Signed) Mrs. Torlotting.'

and informed plaintiff that defendant was going to meet this man Morgan that afternoon at 4:30 at his (Morgan's) room No. 1812 Olive street. At about 4:30 plaintiff, in company with White and plaintiff's son-in-law, Camp, went to the house, 1812 Olive street; were secreted by White in the room next to Morgan's, where White left them. Soon after, the defendant, in company with the man Morgan, entered Morgan's room, remained there for more than an hour, and while there defendant had sexual intercourse with Morgan. The plaintiff, with two other witnesses, had a view of everything that transpired in Morgan's room, by means of holes through the connecting door, through which they commanded a view of Morgan's room.

"Morgan and White were one and the same person. Plaintiff did not know this fact until he saw Morgan enter the room with defendant. Then he could see—and did see—that the man in company with his wife was his agent, White. It may be suspected that plaintiff knew of this identity before he went to the house 1812 Olive street, but there is nothing in evidence from which such a conclusion is a necessary inference, or, to my mind, a natural one. I can not draw such inference from the testimony. Plaintiff denies such knowledge.

"Counsel for defendant attempted, with great skill, to induce plaintiff to admit on cross-examination that he wanted White to catch his wife in the act; but plaintiff put himself

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on safe ground when he stated that he did not want, but 'expected' it. . Plaintiff here—and I think honestly; he certainly did not know the law—observed the proper distinction between a corrupt motive and the mere desire to obtain proof.

"I further find that this man Morgan introduced himself to the defendant on September 30, 1898. According to her story, she saw him but three times, and then in the presence of others, before she went to his room on October 7. She wrote him the note above set forth on October 6.

"Her story as to believing herself in a real estate office, and that she was drugged, I reject entirely. It does not appear that there was any element of temptation, or seduction, or opportunity for same on the part of Morgan. I am impressed with the belief, from all the evidence, that defendant was ready and willing when she first met Morgan to respond to a criminal invitation from him.

"Under the foregoing facts, can the husband be held to have consented to the act of which he now complains?

"If there were any element of seduction in this case, or if the husband had afforded to this agent any opportunity for seduction; if the parties had been thrown together in social intercourse in such a way as to enable the agent to practice upon the woman any arts, wiles or temptations; if there were any evidence tending to show that the wife fell because of the act of this agent of the husband, then I should not hesitate to say that the husband should be barred. But where the evidence shows that the wife made an assignation with a man who was a total stranger to her and whom she had not met under any circumstances of intimacy, and where her conduct was and had been of such a character as to induce a reasonable belief that she was ready and willing, when she first met Morgan, to respond to his invitation, I do not think she should escape the consequences of her crime because her male companion was the agent of her husband, even if it should appear that her

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husband was an eye witness to the act and as such saw that the male companion was his agent.

"The act of the husband in employing White undoubtedly contributed directly to the act of adultery of which he now complains. But there was no corrupt motive, and therein lies the distinction.

"The law deals with facts, and the charge of adultery in this case must rest upon the act of adultery committed with her husband's agent. Yet before this fact can bar the husband, it must appear that the act of adultery resulted from some inducement, persuasion or temptation for which the husband by reason of either direction or permission with corrupt motive is responsible. Under the facts in this case I must hold that the husband did not consent to the act, and that he is an innocent party. Nor do I think that considerations of public policy stand in the way. Rules founded on public policy must be of a general application, hence objections of this character must go to the right of a husband to employ an agent to watch his wife and obtain proof, on the grounds that such employment makes it possible for such agents to corrupt innocent wives. It is sufficient answer to this to say that under all the authorities, the law permits such employment. Furthermore I can not see why chaste wives require such an appeal to public policy for their protection."

In divorce proceedings an appellate court will examine the evidence for itself and draw its own conclusions therefrom, not being bound by the finding of facts made by the trial judge. Morris v. Morris, 60 Mo. App. 86; Davis v. Davis, 60 Mo. App. 545; Green v. Green, 22 Mo. App. 494. But where the testimony was oral and is conflicting, on account of the superior advantage possessed by the trial judge for weighing the testimony and judging of its credibility, an appellate court will give much deference to his conclusions of fact. Clark v. Clark, 48 Mo. App. 157; Stephenson v. Stephenson, 29 Mo. App. 95; Nichols v. Nichols, 39 Mo. App. 291; Parker

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v. Roberts, 116 Mo. 657; Cobb v. Say, 106 Mo. 295; McElroy v. Maxwell, 101 Mo. 294. The testimony on the trial of the case in hand was all oral; it was conflicting, and a great deal of it came from witnesses of a shady character, so that correct conclusions of the facts are dependent mainly on the credibility of the witnesses; the trial judge gave the greater credibility to the plaintiff and his witnesses; deferring to his superior opportunity to correctly weigh the testimony, we are disposed to adopt his conclusions of the facts. The learned circuit judge found as a fact, that the act of respondent in employing White contributed directly to the act of adultery he complained of; but that there was no corrupt motive, and that respondent did not hire White to commit adultery with his wife, or to procure her to commit the offense with any person. The question of law in the case is, may a husband who has good grounds to believe his wife unfaithful, hire a detective to watch her, and may he, when notified by his detective that his wife has made an appointment to meet a man for the purpose of having illicit intercourse with him, go to the appointed place, secret himself, and there witness, without protest or interference, an act of adultery between his wife and his hired agent, without being guilty of such misconduct as to bar his action for divorce, grounded on the act of adultery thus witnessed by him, when he did not know it was his agent who was with his wife, and did not employ him to commit the act? A party seeking a divorce must, as in a court of equity, come into court with clean hands; he must be both an injured and innocent party. Nagel v. Nagel, 12 Mo. 53; Duncan v. Duncan, Ibid, 157; Morrison v. Morrison, 62 Mo. App. 299; Lawlor v. Lawlor, 76 Mo. App. 637. Section 4507 of the Revised Statutes 1889, provides: "If it shall appear to the court that the adultery, or other injury or offense complained of, shall have been occasioned by the collusion of the parties, or done with an intention to procure a divorce, or that the complainant was consenting thereto, or that both parties had

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been guilty of adultery, then no divorce shall be granted." The adulterous act complained of was not done by the collusion of the parties, nor for the purpose of obtaining a divorce —was it done by the consent of the respondent in the sense the word is used in the statute? Construing the word in connection with other words and phrases used in the same section of the statute, we think it means something more than a mere passive acquiescence in the act; it signifies to connive, to agree to, to be willing that it should be done, in the sense that "Saul was consenting unto his (Stephen's) death." (Acts VIII-1). The learned circuit judge found that the respondent in employing White directly contributed to the act of adultery of which he complained, but that his motives were not corrupt. Respondent testified that he was notified when and where the act would be accomplished; that he repaired to the place designated at the hour the crime was to be committed, and saw it done. He testified that when he went there he expected the act would be done. He told his detective Callan that he wanted a divorce, and that he wanted to catch his wife in a compromising position, so that he could get a divorce, and so that she could get none of his property. He told White that he wanted to see the act himself; that he had suspected her virtue since 1890, and that he wanted him to watch her and expected him to catch her in the act. On her return from No. 1812 Olive street to their home, he stated to his children, in her presence and hearing, "I accomplished what I wanted to, I got her dead to rights. I had to pay damned dear for it, but I succeeded at last." It was his hired agent who made the appointment with his wife, and who committed the act with her, and the act was committed by him because of his employment by respondent, to earn his fee, and to do what he was hired and "expected" to do; namely, to furnish ocular proof to his principal, (the respondent) that his wife was unfaithful. In the face of all these facts, we must answer

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the foregoing question in the negative, and hold that the respondent was consenting to the act of which he complains within the meaning of section 4507, *supra*. But for his employment of White to watch his wife, and to furnish him ocular proof of her infidelity, the act of which respondent complains would not have taken place, and the learned circuit judge was correct in finding as a fact, that respondent directly contributed to the act in employing White to watch his wife. White was the agent of respondent in this matter; he was hired to furnish the evidence which he did furnish; he was not restricted as to the means he might employ for the purpose; he was not only to watch, but he was "expected" to furnish the wanted evidence. In such circumstances it seems to us that it would be doing violence to reason and the law of agency, to say that the respondent was not consenting to the act, and that he was not güilty of connivance. 2 Bishop on Mar. & Div., sec. 216; Dennis v. Dennis, 68 Conn. 186. We do not wish to be understood as holding that a husband, who reasonably suspects his wife of infidelity, may not himself watch her and employ agents to watch her, for the purpose of discovering whether the suspect is or is not guilty, or that when he suspects his wife is about to commit the act of adultery, he is bound to try to prevent the act; on the contrary in such circumstances we think he may, without being chargeable with connivance, permit his wife to proceed far enough in the commission of the act to discover to a certainty her lewd disposition. As is said in Wilson v. Wilson, 154 Mass. 194: "The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspect is or is not guilty, without themselves being guilty of connivance." To the same effect are the cases of Rierson v. Rierson, 52 N. Y. Supp. 509 and Krager v. Krager, 24 N. Y. Supp. 219. But if, as in this

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case, he so conducts himself as to directly contribute to the act of which he complains, he is guilty of connivance.

For the reasons above stated, the judgment is reversed, with directions to the trial court to dismiss the plaintiff's bill. All concur.

CHARLES P. JOHNSON et al., Respondents, v. GEORGE W. JONES et al., Appellants.

St. Louis Court of Appeals, December 12, 1899.

1. **Election:** CONSTRUCTION, ACT MARCH 5, 1897: NOMINATING CANDIDATES BY PRIMARY. Under section 4796g of Act, approved March 5, 1897, any twenty qualified voters of a ward, members of the political party ordering a primary election, may by petition in writing and on deposit of ten dollars with the board of election commissioners, have placed on the ballots for the primary, the names of delegates to be voted for at such election.

2. ———: ———: BUT ONE SET OF DELEGATES. Can twenty qualified voters of the party calling the convention nominate a delegation to-day, and to-morrow can twenty other qualified voters of the same party, precinct and ward, nominate a delegation in the same manner, the same persons being on each delegation, and must the board of election commissioners recognize both nominations and give each the privilege of presenting the names of five persons from whom the board must select judges and clerks of the election? Held, under the Act of 1897, that when the first petition was presented and the necessary deposit made, and the delegation mentioned therein was recognized by the board of election commissioners, such delegation was duly nominated, and each member thereof lawfully entitled to have his name printed on the ballots to be voted for at the primary and no further additional petition seeking to nominate and "Independent Delegation" could better or make more complete the first petition, and nothing by the second petition was added whatever to the first, it being a nullity.

3. ———: ———: ———: INJUNCTION. A temporary writ of injunction issued by the lower court enjoining the election commissioners from recognizing the "Independent Delegation" under the pleadings and agreed statement of facts submitted by the parties to the court, was properly issued and its judgment with respect thereto is accordingly affirmed.

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Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

AFFIRMED.

B. Schnurmacher and *Charles Claflin Allen* for appellants.

A part or all of the same names may lawfully appear upon two or more tickets as delegates; (a) The right of different persons or political parties to nominate the same candidate or candidates has been established from time immemorial. State ex inf. v. Bland, 144 Mo. 534; (b) The persons constituting the "delegation" at a primary election correspond to the candidates at a general election; (c) Any twenty qualified voters of the ward have a right under the law to have placed upon the ballot such delegation as they may select, whether or not a part or all of the same delegation has been named by twenty other qualified voters. Act of 1897, sec. 4796g.

Respondent filed no brief.

BLAND, P. J.—Omitting caption, the petition is as follows: "The plaintiffs come now and state that they and each of them are and were at the times hereinafter mentioned qualified voters of the 28th ward of the city of St. Louis, state of Missouri, and all of them are members of the democratic party of the city of St. Louis and state of Missouri; that the democratic party is a political party which at the last general election held in said city of St. Louis polled at least one-fourth of the total vote of said election.

"That the defendants constitute the board of election commissioners of said city of St. Louis, appointed and acting under the provisions of an Act of the general assembly of the state of Missouri, creating said board of election commissioners, and that defendant Jones is chairman of said board of

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election commissioners; that said Saunders is secretary thereof, and that said Brady is a member of said board; that by an Act of the general assembly of the state of Missouri, governing primary elections held in said city, which Act was approved March 5, 1897, provides among other things as follows:

" 'The board of election commissioners in such city, upon notification of the managing and controlling committee of said political party then mentioned shall cause a notice to be published in at least one newspaper, representing such political party, at least five days before the date fixed for holding of such primary election, stating the object of the election, and giving the polling places and names of the judges and clerks of such election.

" 'That said board of election commissioners are required to divide each ward into two districts, including about an equal number of registered voters, for the purpose of such primary election, except in wards containing six thousand or more registered voters, in which event they shall have three districts, and shall locate a polling place in each district, as in their judgment may be most convenient to the largest number of voters therein.

" 'That by section 4796c each delegation may submit to the board of election commissioners a list of five names for each designated polling place, from which lists it shall be the duty of said commissioners to select two judges and one clerk to act at the ensuing primary election; provided, when there are three or more delegations not more than one judge or clerk shall be selected from said lists.

" 'And by section 4796d each delegation, on application to the board of election commissioners, may have a watcher commissioned to enter the polls at each voting place and remain there to witness such election from the opening of the polls to the end of the count. Such watcher may challenge any voter who is not qualified under the provisions of this act to vote at said primary election.

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"'And by section 4796l it is provided in all primary elections the general election laws not in conflict with this act shall control, and the board of election commissioners shall so formulate their instructions to the judges and clerks as to insure a fair election and to prevent fraud.

"'That by section 4796g any number of qualified voters of the ward, not less than twenty, who will certify in writing that they are members of the political party ordering the primary election, may by petition and by deposit of ten dollars for each district, have placed upon the ballot the delegation selected by them.'

"That heretofore, to wit, on or about the twelfth day of March, 1898, the managing committee of the democratic state central committee of Missouri called a convention of delegates representing the Democrats of the various legislative districts outside of the city of St. Louis, and the wards of the city of St. Louis, for the purpose of nominating candidates of the democratic party of the state, at the ensuing state election, for two supreme judges and for a railroad and warehouse commissioner, and for superintendent of public instruction, and also for the election of a chairman of the democratic state central committee, and two members of said committee for each congressional district of the city; said convention being called to meet at the city of Springfield, Missouri, on Wednesday, the tenth day of August, 1898.

"That Honorable Leroy B. Valliant and Honorable William C. Marshall are opposing candidates for the democratic nomination for supreme judge at said convention.

"And thereafter the executive committee of the St. Louis democratic central committee, representing the democratic party of the city of St. Louis, issued their call to hold a primary election under the laws of this state, in the various wards of the city of St. Louis, for the purpose of electing delegates to said democratic convention, which primary election was set for the sixteenth day of May, 1898.

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"And that said primary election will be held on the said sixteenth day of May, 1898; that the 28th ward of the city of St. Louis is a ward of said city, containing six thousand registered voters or more, and was by said board of election commissioners divided into three districts for the purpose of said primary election; that on Saturday, the seventh day of May, 1898, more than twenty qualified voters of the said 28th ward of said city certified in writing to the said board of election commissioners that they were members of said democratic party, and deposited with said board of election commissioners ten dollars for each district into which said board of election commissioners had divided said ward for primary election, to wit, the sum of thirty dollars, and filed with and delivered to said board of election commissioners, their petition signed by them, and each of them, to have placed upon the ballot for said election, printed and delivered by said board of election commissioners, the delegation selected by them and set out in said petition, under the caption of 'Valliant Democratic Delegation,' which delegation was composed of the plaintiffs herein, who intend to support the candidacy of Honorable Leroy B. Valliant; that said 28th ward will be entitled to five delegates in said convention; that afterwards upon the same day twenty other citizens of said 28th ward certified in writing to said board of election commissioners that they were members of said democratic party, and also deposited with said board of election commissioners ten dollars for each district into which said board of election commissioners had divided said ward for primary election, and filed with and delivered to said board of election commissioners their petition, signed by them, to have placed upon the ballot for said election, printed and delivered by said board of election commissioners, the delegation selected by them, and set out in said petition under the caption of 'Regular Marshall Delegation,' which delegation is as follows:

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"'Walter B. Woodward, Henry L. Edmunds, John L. Duffy, William M. Culp and John J. Lavin; that said delegation, and all members thereof, are supporters of the Honorable William C. Marshall, for the nomination for supreme judge before said convention.

"'And that twenty other citizens, qualified voters of said 28th ward, certified in writing, to said board of election commissioners that they were members of said democratic party, and deposited with said board of election commissioners, ten dollars for each district into which said board of election commissioners had divided said ward for primary election, to wit, the sum of thirty dollars, and filed with and delivered to said board of election commissioners their petition, signed by them and each of them, to have placed upon the ballot for said election, printed and delivered by said board of election commissioners, a delegation selected by them and set out in said petition under the caption of "Independent Delegation," which last mentioned delegation was identical with that named under the regular "Marshall Delegation," to wit, Walter B. Woodward, Henry L. Edmunds, John L. Duffy, William M. Culp and John J. Lavin.'

"Plaintiffs say that the last named delegation intend to support Judge Marshall whether they are selected on the one ticket or the other, and have so announced; that the designation of them as an independent delegation is a sham and a fraud.

"Your petitioners say that thereafter, to wit, on the ninth day of May, 1898, they presented to said board of election commissioners a written protest against said duplicate delegation, and sought to have said commissioners rule and hold that said Woodward, Edmunds, Duffy, Culp and Lavin, were only entitled to the rights of one delegation.

"That after hearing the said protest and the reasons for presenting the same, the said board of election commissioners

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overruled the same and announced to the plaintiffs that they would permit said regular 'Marshall Delegation' and said so-called 'Independent Delegation,' composed of identically the same persons as said regular 'Marshall Delegation,' the right to be represented in said primary election by one judge, one clerk each, so that said delegation consisting of said Woodward, Edmunds, Duffy, Culp and Lavin would have representing them in said election two judges, two clerks and two watchmen instead of one, as required by law.

"Plaintiffs say that it is provided by said Act of 1897 that said board of election commissioners shall so conduct said primary election as to insure a fair election and to prevent fraud, and that it is the intention of said Act that no advantage shall be given to any one delegation over another in their representation at the polls by judges, clerks and watchmen. But, notwithstanding this fact, the said board of election commissioners have announced their intention, and will, unless restrained by an order from this honorable court, give the said Woodward, Edmunds, Duffy, Culp and Lavin two judges, two clerks and two watchmen as representatives instead of the number required by law.

"That it has become and now is the duty of said board of election commissioners to appoint solely from the ten names presented by the Marshall and Valliant delegations, two judges and one clerk for each polling place in said 28th ward of the city of St. Louis, that is three officers in all and no more. But notwithstanding that fact said board of election commissioners have announced that they will appoint and have appointed, two judges and two clerks in each of said polling places from the lists submitted on behalf of said Woodward, Edmunds, Duffy, Culp and Lavin, and one judge and one clerk from the list submitted by plaintiffs, or a total of six officers, whereas under the law, only three should be appointed.

"Your petitioners say that the filing of said duplicate delegations under different captions is an evident attempt to

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give said 'Marshall Delegation,' and the same under the name of the 'Independent Delegation,' two judges and two clerks as against one of said 'Valliant Delegation,' and is contrary to law and an injustice to plaintiffs, and a fraud upon their rights; that the defendants by treating the same individuals twice named as two delegations, carry into execution said fraudulent and unlawful design.

"Your petitioners state that said board of election commissioners will carry out their arbitrary and illegal intentions unless this court shall issue an injunction to prevent them from so doing.

"They further state that they were remediless in the premises by or through ordinary process or proceeding of law, and they, therefore, pray this honorable court to enjoin and restrain the said Jones, Saunders and Brady, being the board of election commissioners as aforesaid, from appointing judges and clerks for said duplicate independent delegation; and that they be commanded and directed to select and appoint one judge from the list submitted by petitioners, and one judge from the list first filed by said Woodward, Edmunds, Duffy, Culp and Lavin, and one clerk from the ten names so submitted by petitioners and the first list submitted by Woodward, Edmunds, Duffy, Culp and Lavin; that the said commissioners be enjoined and restrained from printing or placing on the ballot to be prepared by them, two list of delegates containing the names of Woodward, Edmunds, Duffy, Culp and Lavin under two different captions; that they be enjoined and restrained from printing and publishing said names under any other caption than that first filed by them; that they, the said commissioners, be commanded and directed and required to select and re-select the judges and clerks of said election, disregarding entirely the list of names last filed by the delegation composed of Woodward, Edmunds, Duffy, Culp and Lavin. And for such other and further relief as to the court may seem proper."

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To this petition defendants filed the following reply:

"Now come defendants and for answer to the petition of plaintiffs admit that they compose the board of election commissioners of the city of St. Louis, and that they are duly qualified and acting as such commissioners as in the petition is set forth.

"Further answering said petition, defendants deny each and every allegation thereof, excepting such allegations as are hereinafter specifically admitted.

"And for further answer these defendants state that under the provisions of an Act of the general assembly of the state of Missouri, concerning primary elections held in the city of St. Louis, approved March 5, 1897, it is provided by section 4796g, that any number of qualified voters of a ward, not less than twenty, who will certify in writing, that they are members of the political party ordering the primary election, may by petition, and by a deposit of ten dollars for each district, have placed upon the ballots a delegation selected by them; that by section 4796c it is provided that each delegation may submit to the board of election commissioners a list of five names for each designated polling place, from which lists it shall be the duty of said commissioners to select two judges and one clerk to act at the ensuing primary election, provided that if there are three or more delegations no more than one clerk or judge shall be selected from any one delegation.

"Further answering defendants say that on or about the twelfth day of March, 1898, the managing committee of the democratic state central committee of Missouri called a convention of delegates representing the Democrats of the various legislative districts outside of the city of St. Louis and of the wards of the city of St. Louis, for the purpose of nominating candidates of said party at the coming state election for certain state offices, among them two judges of the supreme court, the said convention being called to meet

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at the city of Springfield, Missouri, on the tenth day of August, 1898; that thereafter the executive committee of the St. Louis democratic central committee, representing said democratic party in the city of St. Louis, issued their call to hold a primary election under the laws of the state of Missouri, in the various wards of said city, for the purpose of electing delegates to said state democratic convention, which primary election was set for the sixteenth day of May, 1898, all pursuant to notice published by defendants, composing said board of election commissioners, upon notification of said St. Louis democratic central committee; that the said 28th ward was divided into three districts by defendants for the purpose of said primary, pursuant to section 4796b of said Act of the general assembly.

"Further answering these defendants state that at least twenty qualified voters of the 28th ward aforesaid, did certify in writing to defendants, constituting the board aforesaid, that they were members of the democratic party, and did request of defendants that they place upon the ballots for said election a delegation selected by them and set out in their request and petition, under the caption of 'Valliant Democratic Delegation,' which delegation was composed of the plaintiffs to this cause; that thereafter, and on the same day, at least twenty other qualified voters of said 28th ward did certify in writing to defendants that they were also members of said democratic party, and did file with and deliver to defendants constituting the board aforesaid, a petition signed by them to have placed upon the ballots for said primary election a delegation selected by them and set out in their said request and petition, under the caption of 'Regular Marshall Delegation,' said delegation being composed as follows: Walter B. Woodward, Henry L. Edmunds, John L. Duffy, Wm. M. Culp and John J. Lavin; that thereafter and on the same day, twenty other qualified voters of said 28th ward did certify in writing to defendants, constituting the board aforesaid, that

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they were also members of the democratic party and did file with and deliver to defendants their petition by them signed, to have placed upon the ballots for said primary election a delegation selected by them in their petition set out, under the caption of 'Independent Delegation,' which said delegation was composed as follows: Walter B. Woodward, Henry L. Edmunds, John L. Duffy, Wm. M. Culp and John J. Lavin.

"And defendants state that said three petitions having been accompanied by the proper deposits required at law, all being in due and proper form, these defendants did propose to place upon the ballots printed by them for the said primary election, the names of said three delegations under the captions aforesaid, to wit: 'Valliant Democratic Delegation,' 'Regular Marshall Delegation' and 'Independent Delegation,' and did so announce and would so have done but for the temporary injunction heretofore granted herein these defendants having no option other than to print upon the ballots prepared by them the names of such delegations as are filed with them, when certified to by any twenty qualified and registered voters of a ward.

"And defendants state that by section 4796c it is made the duty of these defendants to select two judges and one clerk to act at such primary elections from each list of five names for each designated polling place, which list, by the terms of said section, may be submitted to the board of election commissioners by each delegation; provided, however, that when there are three or more delegations, not more than one judge or clerk is to be selected from the list of any one delegation.

"And defendants state that each of the three delegations aforesaid having submitted to defendants a list of five names for each designated polling place in said 28th ward, these defendants proposed and did announce that they proposed to select from each of said lists one judge and one clerk for each

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of said polling places, and that they would so have done except for the temporary injunction heretofore granted herein.

"Wherefore, having fully answered, defendants pray to be hence discharged."

On the hearing the following agreed statement of facts was filed: "Plaintiffs may be regarded as having offered evidence tending to show that the delegation referred to in the pleadings as the 'Regular Marshall Delegation' and the 'Independent Delegation' proposed, if elected to the convention referred to in the pleadings, to vote for Hon. Wm. C. Marshall as a candidate, to be nominated for the office of supreme judge. It is admitted that Hon. Leroy B. Valliant and the Hon. William C. Marshall were opposing candidates for the democratic nomination for the office of supreme judge at such convention. It is also admitted that the persons composing the 'Regular Marshall Delegation' and the 'Independent Delegation' were the same in person as well as in name; that is, that they were the same identical persons."

On the pleadings and agreement of facts, the court perpetually enjoined the defendants from recognizing the "Independent Delegation." From this decree defendants appealed.

Appellants insist that any twenty qualified voters of a ward, who are members of the political party which has ordered a primary election, under the provisions of the Act of 1897 may by petition in writing and on deposit of ten dollars with the board of election commissioners, have placed on the ballots for the primary election a delegation selected by them. This proposition is unquestionably true, but it is not the question in this case. The question here is, may twenty qualified voters of the party calling the convention so nominate a delegation to day, and may twenty other qualified voters of the same party, precinct and ward, nominate to-morrow in the same manner, as did the petitioners to day, the same persons as a delegation, and must the board of election commissioners recognize both nominations, and give both

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the privilege of presenting the names of five persons from whom the board must select judges and clerks of the election? In our opinion this can not be done under the Act of 1897. When the first petition was presented and the deposit of $10 made, and the delegation was recognized by the board of election commissioners, the delegation was duly nominated, and each member of the delegation was lawfully entitled to have his name printed on the ballots to be voted at the primary election. No future or additional petition could add one iota to this right. It was made full and complete by the first petition; the second added nothing whatever to it; it (the second petition), was a work of supererogation and accomplished nothing, and should have been rejected by the board of election commissioners. Wherefore the judgment is affirmed. All concur.

WILLIAM F. NORTON, JR., Appellant, v. THIEBES STIERLING MUSIC COMPANY, Garnishee of GUSTAV HEINRICHS, Respondent.

St. Louis Court of Appeals, December 12, 1899.

1. **Attachment, Fraudulent:** GARNISHMENT: TRIAL OF ISSUES MADE THEREBY. Respondent company advanced money to defendant Heinrichs and guaranteed other outlays for which defendant would be liable to enable him to fulfill his engagement at Music Hall, St. Louis. Respondent took promissory notes for the money advanced and instituted friendly attachment suits to collect same, the constable executed the writs so as not to disturb the property, the sale of tickets or the operatic performance of defendant's company. Appellant afterward instituted garnishment proceeding on attachment whereby the sheriff took possession of ticket receipts for the last evening of the performance and seized certain trunks, costumes, music and musical instruments as the property of defendant: Held, that as the purpose of the attachments by respondent was to hold off Heinrichs' other creditors until his engagement at Music Hall had been filled, and the proceeds thereof absorbed by respondent, they were, however honest in fact, fraudulent in law to whatever extent they hindered and delayed his other creditors.

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2. ———: ———: **PREFERENCE OF CREDITORS. Although the attachment suits may have had the effect of shielding the property of Heinrichs from his other creditors, yet upon the principle that a debtor may prefer one creditor over another, such suits unless they did hinder and delay other creditors from collecting their debts, were not fraudulent.**

3. ———: ———: **VOID LEVIES. The levies of the writs of attachment by the constable without his taking possession of the property and of the future receipts arising from the tickets, constituted no levy and was a nullity, as property levied upon must be capable of seizure, and be seized.**

Appeal from the St. Louis City Circuit Court.—*Hon. Seldon P. Spencer*, Judge.

REVERSED AND REMANDED.

Lubke & Muench for appellant.

(1) The entire arrangement between the garnishee and the attachment creditor, by which the property was temporarily withdrawn from the reach of other creditors, and left in possession of the debtor for his use, was fraudulent in law, and can not stand. R. S. 1889, sec. 5170; Shelley v. Boothe, 73 Mo. 77; Bigelow v. Stringer, 40 Mo. 195. (2) The alleged levy in this case was no actual levy. The only property ostensibly levied on was such as was completely left in the possession of the attachment defendant, to be used by him while he was in the city, the covinous levy being released as soon as defendant had finished his engagement here. Such a levy has been variously held to be either presumptively void or absolutely void. It has never been upheld. Freeman on Executions, secs. 260, 261; Crocker on Sheriffs, sec. 435; Bond v. Willett, 1 Keyes (N. Y. App.), 386; Bump on Fraud. Convey., sec. 522; Burrows v. Stoddard, 3 Conn. 160; Reed v. Ennis, 4 Abb. Pr. 393; Chancellor v. Phillips, 4 Dall. 213; Tainter v. Williams, 7 Conn. 271, 273; Davidson v. Waldron, 31 Ill. 120. (3) To secure any legal right to the property

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of the defendant, as against other creditors, the officer must make an actual levy or seizure. To levy means to actually seize and hold such personal property of the debtor as can be sold by order of court. He could not levy on the future possible proceeds of property not even levied on. The "levy can not rest in mere undivulged intention to seize the property." R. S. 1889, sec. 539; Douglass v. Orr, 58 Mo. 575; Shaullein v. Francis, 67 Mo. App. 462. (4) A garnishee who has received the money or goods of the debtor into his hands, pursuant to a fraudulent scheme between the two, is liable to other creditors on writ of garnishment. Lee v. Tabor, 8 Mo. 322; Potter v. Stevens, 40 Mo. 591; Strauss v. Ayers, 34 Mo. App. 248; Doggett v. Fire Ins. Co., 19 Mo. 201; Joseph v. Boldridge, 43 Mo. App. 333.

Joseph Wheless and *Lee W. Grant* for garnishee.

"The right to dispose of one's own property for an honest purpose is not terminated by indebtedness or insolvency; although such a disposition may, or does, have the effect of hindering or delaying other creditors." Dougherty v. Cooper, 77 Mo. 528. "An insolvent debtor, or one in failing circumstances, has a right, with an honest view to pay his debts, to convey his property to one or more of his creditors in payment of their debts, and such creditors have the right to take an assignment of the property to secure their claims." Ames v. Gilmore, 59 Mo. 537; Schroeder v. Bobbitt, 108 Mo. 289; Nelson Dist. Co. v. Creath, 45 Mo. App. 169; Larrabee v. Franklin Bank, 114 Mo. 592. "Such a debtor may transfer all his property to one creditor, and leave the others wholly unpaid." Cason v. Murray, 15 Mo. 378; State ex rel. v. Distilling Co., 20 Mo. App. 21. And this actual levy and continuous possession existed on Saturday evening when the sheriff's attempted levy was made. His seizure of the money in the hands of the deputy constable, who was in possession, was a high-handed wrong.

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BLAND, P. J.—William F. Norton, Jr., brought suit in the circuit court, city of St. Louis, against Gustav Heinrichs, by attachment; the Thiebes-Stierlin Music Company was garnished and appeared in said court, and to interrogatories denied any indebtedness to the defendant Heinrichs; Norton replied, alleging in substance, that the garnishee knowing that Heinrichs was indebted to Norton and others, entered into a conspiracy and arrangement with Heinrichs, whereby the Thiebes-Stierlin Music Company should institute certain attachment suits against Heinrichs before a justice of the peace within the city of St. Louis, upon which writs should be issued and delivered to a constable, and that ostensible levies should be made on all the assets of Heinrichs to be found in said city, and that these ostensible levies should be maintained on the receipts of the sales of tickets that were and should be made to certain operatic performances, given and to be given by Heinrichs Operatic Company at the Grand Music Hall in the said city of St. Louis during a week beginning about March 9, 1896; that to carry out this fraudulent scheme Heinrichs gave to the garnishee his four promissory notes of $500 each, due on demand, which notes were immendiately filed before a justice for suit and writs of attachment procured and delivered to a deputy constable, who under the direction of the garnishee made ostensible levies on all the property of Heinrichs found in St. Louis and on all the moneys then received and which should be thereafter received for the sale of tickets to the several operatic performances, given and to be given by the Heinrichs Operatic Company; that no actual levy was made on anything, and that the constable took nothing into his possession on which he pretended to levy the several writs of attachment, but that all the money received on account of the sale of tickets went into the possession of the garnishee, etc., and from this source it (the garnishee) received $2,500, of the moneys of Heinrichs, and that the other property of Heinrichs, on which

the constable ostensibly levied was turned back to Heinrichs or other claimants.

The answer of the garnishee was a general denial. The issues were tried by a jury, who found a verdict for the defendant. After an unavailing motion for new trial plaintiff appealed.

From the evidence adduced on the trial we gather the following facts: Heinrichs, a resident of the city of New York, in 1896 organized an opera company of about one hundred musicians, and started out to give performances in several cities, including the cities of Cincinnati, Ohio, and St. Louis, Mo.; his advance agent, Alfred Hoegerle, came to the city of St. Louis, to arrange for a series of entertainments to be given here; to perfect his arrangements he interested the Thiebes-Stierlin Music Company, a corporation conducting a music store on Olive street, St. Louis, and induced this company to make advance sales of tickets, to guarantee hall rent, printing bills, etc. After the guarantees had been given and after a considerable number of advance sale of tickets had been made and the performances to begin March 9, 1896 had been largely advertised, Hoegerle went to Fred C. Stierlin, secretary of the Thiebes-Stierlin Music Company, and represented to him that Heinrichs with his company was stranded in the city of Cincinnati, and unless financial assistance was given him, he would not be able to come to St. Louis to fill his engagements. Stierlin in company with Hoegerle, immediately went to Cincinnati and found the situation as represented, and that it was necessary to pay out considerable sums of money and guarantee the payment of other sums to enable Heinrichs and his company to get out of Cincinnati and to reach St. Louis in time to meet their engagements there. To get the opera company out of Cincinnati, Stierlin, for his company, advanced $1,465 to Heinrichs, and guaranteed his and the railroad fare of his company from Cincinnati to St. Louis, and took from Heinrichs and his manager Hoegerle the following

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contract, to secure what had been paid to, and what the garnishee had agreed to pay for Heinrichs, to wit:

"Cincinnati, March 7, 1896.

"Received of Thiebes-Stierlin Music Company fourteen hundred and sixty-five dollars. Advanced to Heinrichs Grand Opera Company. Said amount to be deducted from first receipts from performances to be given at St. Louis Exposition Music Hall during week of March 9, 1896.

"The Heinrichs Grand Opera Company guarantee the Thiebes-Stierlin Music Company against all losses, and should the amount of the St. Louis engagement be insufficient to cover the above and any other advances made, the indebtedness not repaid is to be considered a first lien on the receipts of any future engagements at any city in any state until the whole amount shall have been paid.

"The Heinrichs Grand Opera Company further guarantee to give seven performances at the Music Hall in St. Louis, and to give the Thiebes-Stierlin Music Company the preference over and above all creditors on the receipts of such performances until they shall have been paid.

"Done in Cincinnati, Ohio, this 7th day of March.

"Gustav Heinrichs,
"Alfred Hoegerle,
"Business Manager."

At the same time Heinrichs and his manager agreed that the Thiebes-Stierlin Music Company should handle the sale of all tickets and apply the gross proceeds to the payment of advances already made and all other advances to be thereafter made to enable Heinrichs to give the opera performances he had agreed to give. Under this arrangement the Thiebes-Stierlin Music Company handled the sale of all tickets to the performances given at the Grand Music Hall and all the moneys that were received on sales of such tickets, which amounted to $3,450. The amount paid out by the Thiebes-Stierlin Music Company to bring Heinrichs & Company to

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St. Louis, for rent of hall, advertising, and other expenses incurred on account of the performances, was $5,774.77. Out of the proceeds of the sale of tickets the Thiebes-Stierlin Music Company paid a debt due from Heinrichs to a party in the East, and advanced some money to Heinrichs during the performances to pay personal expenses of Heinrichs & Company, leaving a balance in its hands to the credit of Heinrichs of $2,479.88, and a balance due from Heinrichs to the garnishee of $3,294.89. The performances began on a Monday; on the following Wednesday or Thursday Mr. Delano, a lawyer, presented a bill of $187 due from Heinrichs to an eastern party, to the Thiebes-Stierlin Music Company for payment, and threatened to attach Heinrichs and stop the performances if the bill was not paid. The music company paid this debt from moneys received on sale of tickets, rather than have the performances interrupted by an attachment, and then employed Delano as its attorney, who the secretary of the company (Mr. Stierlin) says he understood had made the law of theatricals a specialty, to take care of its claims against Heinrichs, and that after showing Delano the contract with Heinrichs, Delano advised that the promissory notes of Heinrichs should be taken and attachment suits be brought and the proceeds be secured in this way to prevent other creditors from attaching them; that acting on this advice four promissory notes of $500 each were presented to Heinrichs for his signature; these he signed, whereupon attachment suits were immediately instituted before a justice, writs of attachment were issued and delivered to a deputy constable, who proceeded to execute them in such a manner as not to disturb the property, the sale of tickets or the operatic performances. The deputy constable went to the Grand Music Hall with his writs, where he saw a lot of trunks and musical instruments, which he says he levied on, and put a watchman over. He took possession of none of these, did not make an examination to find what the trunks contained, touched nothing, made no

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disturbance, but left a man to watch. He went to where the employees of the Thiebes-Stierlin Music Company were selling tickets for the performance—the box office at the Music Hall, swore in one of them as deputy constable, and directed him to keep an account of all moneys received on account of the sale of tickets, to keep it and to give him receipts for the amounts taken in at each performance. The so constituted deputy continued to sell tickets, to count up the cash taken in at each performance, turned it in to his employer, and gave the constable receipts therefor in his own name. This continued until the last performance, when the sheriff got possession of the box receipts by virtue of the writ issued in the suit of Norton v. Heinrichs. It is quite apparent that the constable levied upon nothing; his pretended seizure was no seizure, and it is also apparent from the evidence on the part of the garnishee that it was intended by the Thiebes-Stierlin Music Company (the plaintiff in these attachment suits) that no actual seizures should be made; it is equally patent that the object of the attachments was to hold off the other creditors of Heinrichs until his engagements at the Grand Music Hall should be all filled and the proceeds thereof should be taken in by the Thiebes-Stierlin Music Company. However honest the purpose of the Thiebes-Stierlin Music Company may have been in this proceeding, its effect was to hinder and delay the other creditors of Heinrichs, and was in law fraudulent, provided any of Heinrichs property which was liable to execution or attachment was tied up by the attachments and placed or intended to be placed beyond the reach of his creditors. Under the contract made by Heinrichs and his manager with the Thiebes-Stierlin Music Company in Cincinnati the gross receipts of the sales of tickets was the money of the garnishee; all the tickets that were sold for the performances at the Grand Music Hall were sold by the garnishee, so that the moneys received therefor was not only its moneys, but were received and kept by it. It seems from the evidence of Heinrichs

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that the constable levying the attachment writs took a bunch of music of the Opera Il Trovatore, the property of Heinrichs (value not stated), but that all other personal property, on which the constable attempted to levy, was either borrowed property or property of members of the opera company other than Heinrichs, none of which ever came into the possession of the constable. So that if we are to believe the evidence oral and written of the officers of the Thiebes-Stierlin Music Company and of Heinrichs and his manager, there was at no time any moneys or properties in the hands of the garnishee belonging to Heinrichs, unless it was the bunch of music, or that it owed Heinrichs anything. But the cause was tried upon an entirely different theory, to wit, upon the theory that the attachments brought by the garnishee against Heinrichs, were for the purpose of hindering and delaying the creditors of Heinrichs. That they were brought for that purpose, is practically admitted by the officers of the garnishee company. On this question of fact the evidence is all one way. The jury under instructions given by the court found that the attachments were *bona fide* prosecuted; there was perhaps no intentional fraud; there was however fraud in law, but the fraud did not hinder or delay any creditor of Heinrichs, for the reason that no property of his was attached, except the bundle of music. The appellant was not injured because the Thiebes-Stierlin Music Company attached, or attempted to attach its own moneys. It may be that the appellant is entitled to recover the value of the bunch of music; he is unquestionably entitled to recover the costs of this appeal, wherefore the judgment is reversed and the cause remanded. All concur.

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SAWYER-AUSTIN LUMBER COMPANY, Appellant, v. CHARLES M. CLARK, et al., Respondents.

St. Louis Court of Appeals, December 12, 1899.

1. **Mechanic's Lien:** LOT CONTRACTED FOR: LIEN ON HOUSE: INTEREST IN LOT. Clark's possession of the lot under contract to purchase it, and the erection of a building thereon, subjected the building to a mechanic's lien, and the lot also, to the extent of his interest therein, enforcible according to his interests in either, at the time of the trial.

2. ——: ——: MIS-DESCRIPTION: AMENDMENT. If the petition used "South" instead of "North," and it was evident from the context of the description that the use of the word "South" instead of "North" was a mistake, such mistake could not vitiate the description, if by a proper substitution of the word "North" the description would be completed; besides had it been necessary for a correct description of the property, the court should at the trial have permitted the amendment asked for by appellant for that purpose.

3. ——: MATERIALMAN: INCUMBRANCES. As to the building apart from the lot, the statute prefers the lien of the materialman to the lien of prior incumbrances upon the land, and permits the sale and removal of said building from the lot in the enforcement of such lien.

4 ——: ——: LIEN ON BUILDING: UNAFFECTED BY LIEN ON LAND. The lien enforcible by the materialman or laborer against the building does in no way depend upon the obtention of a lien on the land.

Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

Reversed and remanded.

Blevins, Lyon & Swarts for respondents.

(1) The materials furnished by the appellant to the defendant, Clark, were not furnished under a contract with the owner of the land upon which the building was erected, nor

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with a lessee or mortgagor and therefore the appellant was not entitled to a lien on the building, separately from the land. Planing Mill Co. v. Christophel, 60 Mo. App. 106; State to use Lumber Co. v. Hailey, 71 Mo. App. 200. (2) The description of the land, both in the lien account and in the petition, is fatally defective; that in the petition the land is located on the south side of Evans avenue, when in fact it is located on the north side of Evans avenue, as shown by the evidence in behalf of the appellant; and that the descriptions of the land as contained in the lien account and the petition, when taken together, are so uncertain, vague and contradictory as to render the description totally insufficient and fatally defective. Lemly v. Iron & Steel Co., 65 Mo. 545; Mill Co. v. Nast, 7 Mo. App. 147. (3) The items of the lien account, as filed by the appellant, are conclusive against the appellant. Coe v. Ritter, 86 Mo. 277. (4) The appellant was not entitled to a lien, because it failed to show, how much of the lumber went into the building referred to in the lien account and petition. Fitzpatrick v. Thomas, 61 Mo. 512; Barnett's Executrix v. Murray, 62 Mo. App. 500.

Robert L. McLaran and *Jared W. Young* for appellant.

(1) Clark was an owner within the purview of the statutes relating to mechanics' liens, and as such could subject the property to a lien. Judd v. Duncan, 9 Mo. App. 417; O'Leary v. Rowe, 45 Mo. App. 567; Kline v. Perry, 51 Mo. App. 422; Meyer v. Christian, 64 Mo. App. 203. (2) Plaintiff's description of the lot was sufficiently accurate, and the partially incorrect description by metes and bounds in the petition may be rejected as surplusage on the maxim "*falsa demonstratio non nocet.*" Progress Press-Brick Company v. Company, 52 S. W. Rep. 401; Rall v. McCrary, 45 Mo. App. 365; DeWitt v. Smith, 63 Mo. 263; Cahill v. Orphan School, 63 Mo. App. 28; Bambrick v. King, 59 Mo. App. 284. (3)

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The error in credits in the lien account was merely a clerical one and self-explanatory.

BOND, J.—On the eighteenth of February, 1898, S. J. Fisher contracted to sell to C. M. Clark a lot on the north side of Evans avenue in this city with a frontage of 26 feet and 9 1-2 inches and a depth of 165 feet. The lot was made up of 25 feet of the eastern portion of lot 19 and 1 foot 9 1-2 inches of the western portion of lot 18 of city block 3732. Fifty dollars cash was paid on account of said purchase, and the balance of the purchase money was agreed to be paid forty days thereafter. There was evidence tending to show that the purchaser was allowed sixty days additional time to make this deferred payment. Plaintiff under a contract with the purchaser, furnished lumber for the erection of a building on said lot and brought this action to establish a mechanic's lien upon said building and the land upon which it stood. The improvement consisted of a two story brick building arranged as flats, which was 26 feet wide. It stood 7 1-2 inches west of the eastern line, and 2 inches east of the western line of the lot, which Fisher agreed to convey to Clark. The evidence tended to show that the lumber, for whose price the suit was begun, entered into the construction of said building, and was furnished for that purpose between from the sixth or eighth day of March to the second day of April, 1898. The lien account correctly stated the dimensions of the lot which was the subject of the contract between Fisher and Clark, but referred to it as part of lot 19 of city block 3732, when in point of fact it was composed and made up of the contiguous portions of lots 19 and 18 in the proportions specified in the contract between Fisher and Clark. After the introduction of the lien account, plaintiff moved the court to permit an amendment of the petition, so as to conform its description of the property to the description given in the lien account, which plaintiff insisted could be done by merely striking out the

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specific boundary mentioned in the petition, which erroneously showed that the south instead of the north line of Evans avenue, was the beginning point of the lot. The court overruled this motion, to which exception was duly saved. Thereupon plaintiff disclaimed any right to subject the land on which the building was situated to a mechanic's lien, the proof showing that up to the time of the trial Clark, the purchaser, had not paid the balance of the purchase money, nor acquired title to the land further than resulted from his contracts with Fisher, the owner, but plaintiff insisted that it was still entitled to a lien against the building. The evidence showed that Clark was in possession of the lot under his contract to purchase it during the whole time of the accrual of plaintiff's account and until the erection and completion of the building on said lot.

The cause was submitted to the court without a jury. Plaintiff requested the court to give the following declarations of law:

1. "The court declares the law to be, that if the court believes from the evidence that defendant Clark was in possession of the land under and by virtue of a contract to purchase the same from defendant Fisher, the owner and while in possession thereof began the erection of a building thereon, then said Clark had an interest in said land as owner within the purview of the Missouri Statutes and could subject said building and his interest in the land to a mechanic's lien."

2. "The court further declares the law to be, that if the court believes from the evidence that plaintiff furnished material upon the building erected by said Clark on the land described in plaintiff's lien and petition, and under a contract with said Clark, and that said material entered into and became a part of said building, and that thereafter plaintiff complied with all the statutory requirements for establishing a mechanic's lien, then plaintiff is entitled to such a lien on said building."

3. "The court declares the law to be, that if the court

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believes from the evidence that defendant Fisher, being the owner of lots 18 and 19 in block 11 of Evans Place in city block 3732 of the city of St. Louis, entered into a contract of sale with defendant Clark, whereby he agreed to sell to him the eastern 25 feet of said lot 19 and the western 1 foot 9 1-2 inches of said lot 18, and in pursuance of said agreement said Clark entered upon and took possession of said piece of land and began the erection of improvements thereon, then said lot of land is one complete and entire lot as regards defendants Fisher and Clark and all those claiming through or under them."

4. "The court declares the law to be that although the court may find from the evidence that the building erected on the lot of land in question is situated on contiguous lots owned by defendant Fisher, that plaintiff is nevertheless entitled to a mechanic's lien on the building situated thereon, if the lien papers are otherwise good."

The court refused all of the foregoing declarations and at the instance of defendant declared against the right of plaintiff to recover a lien, and accordingly gave judgment for defendant, from which plaintiff has appealed to this court.

Respondents insist that there are such imperfections in the description of the property in the petition and lien as to justify the ruling of the court The allegation in the petition that the beginning point in the boundary of the lot was on the south line of Evans avenue, is shown to have been a mere error in the use of that term when the term north was meant by a notation of the subsequent courses and distances completing the description of the lot. These showed that starting from the beginning point the course was north 165 feet 10 inches, thence east 26 feet 9 1-2 inches, south 165 feet 10 inches, thence west to the beginning. This description would take in the width of the street as the southern frontage and a portion of the lot, which would be a patent error, since the vendor could not convey a public street. As this could not

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have been intended, and as the course of the measurements located the land on the north side of the street, it is demonstrable that the pleader intended to allege that the beginning point was on the north line of the street, and that by inadvertence or clerical error the word south was inserted in lieu of the word north. The use of a term in the description of land which the context shows was a mere mistake for another, will not vitiate the description if the substitution of the proper term will complete it. We, therefore, attach no importance whatever to the evident misuse of the word south for north in the description of the land given in the petition. Besides, if there had been any force in respondents contention on this point, it would have been the duty of the trial court to have allowed appellant to strike out the specific description of the land set forth in its petition, and to have proceeded under the general description of the land given in the petition which was in entire conformity with the full description of the land given in the lien paper. But respondents also contend that the lien paper itself did not contain a sufficient description of the property under the statute. The only objection which can be urged to its sufficiency is, that after giving correctly the full dimensions of the lot, the lien paper locates the lot in question wholly on what was known as lot 19 in the divisions of the city block, when in point of fact it projected 1 foot 9 1-2 inches over lot 18, as shown by the plat of the city block. The only persons who could be affected by this inaccuracy of description were the owners or prior incumbrancers of the land. To each of these the description given in the lien paper furnished reasonable means of identification of the lot. As to Fisher, the owner, the recital in the lien paper of the exact measurements of the lot as set forth in his contract with Clark, necessarily affected him with the knowledge of its true location. As to prior incumbrancers the description of the property given in the lien paper if followed out, would have carried them to the spot where they would have discovered

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the house erected on lot 19, and that it projected over the contiguous lot. This fact would have afforded them further information that the owner of the building was in possession of some part of lot 18 under his contract with their grantor. In view of the distinct designation of the locality of the property thus afforded by the description thereof in the lien paper, and the further fact that appellant only claimed on the trial a right to subject the building alone to a lien for its demand, it is difficult to see any reasonable basis for the theory of respondents that the correct description of the dimensions of the property given in the lien paper was invalidated by the inaccuracy of locating the lot thus described 1 foot 9 1-2 inches west of its eastern boundary line, when the situation of the building on the true location of the lot and the contract in the hands of the owner of the building who was in possession of the lot as truly located, would have informed any one seeking to locate the property described in the lien paper of its true and correct boundary line. Under the evidence in this record the description of the property in the petition and in the lien paper was sufficient to meet the requirements of the statute as against defendants, so far as to charge the building only with a mechanic's lien, if it can be held that appellant was entitled to that relief. But respondents insist that appellant had no contract with the owner of the land, and hence is not entitled to a lien against the building for the material which entered into its construction. The statutes governing the right of a materialman to charge the building into which his material has entered with a lien for its value, afford the right upon the condition that the material is so furnished "under or by virtue of any contract with the owner or proprietor" of the land upon which the building shall be erected, and they extend the right both to the building and "upon the land belonging to such owner or proprietor," and as to the latter (the land) "to the extent and only to the extent of all the right, title and interest owned

therein by the owner or proprietor of the building." As to the building the statute prefers the lien of the materialman to the lien of prior incumbrances upon the land, and permits the sale and removal of said building in the enforcement of such lien. R. S. 1889, sections 6705, 6706 and 6707; K. C. Hotel Co. v. Sauer, 65 Mo. 279; Crandall v. Cooper, 62 Mo. 478; Reilly v. Hudson, 62 Mo. 383; Seibel v. Siemon, 52 Mo. 363. In the case in hand the contract for the material was made between appellant and C. M. Clark, who had paid a part of the purchase money for the land upon which the building was to be erected, and was in possession under a written contract executed by the holder of the legal title to convey the land in fee to Clark upon the payment by him of the balance of the price. Under all the principles of law applicable to the transfers of title to real estate Clark, by virtue of these facts, became vested with an equitable right or interest in the land which entitled him upon compliance with such contract to a deed in fee. That it was the design of the statute to recognize as owner one who held the title, legal or equitable, which constituted him such under the rules applicable to conveyances of real estate, can not be denied. The terms of the statute fully warrant this proposition, and such has been the construction uniformly given to it. O'Leary v. Roe, 57 Mo. App. loc. cit. 572; Jodd v. Duncan, 9 Mo. App. 417. It is clear, therefore, that the contract made by appellant with Clark—who was then the equitable vendee of the land—was in the statutory sense a contract with one who was an owner or proprietor of the land. The lien of appellant attached when its material was first put into the building. Both at that time and when the last of its materials had been put into the building, Clark was in possession of the lot under an unexpired contract entitling him to a deed upon the making of certain specific payments in the future. Beyond question the interest in the land so held by Clark was one which he might have conveyed or assigned at any time prior to the date fixed in his

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contract for the payment of the remainder of the purchase money of the lot. It was, therefore, such a title or interest as could be subjected to a mechanic's lien, provided the lien could be enforced before it should expire under the term of the contract. The fact that when the lien suit was tried Clark had lost his interest in the land, can not deprive appellant of the right to enforce its lien against the building. For the lien having accrued under valid statutory conditions against both the building and the lot was not lost as to the one because the interest in the other had become valueless.

The cases cited by respondent (60 Mo. App. 106; 71 Mo. App. 200) have no application. The former merely decided that the husband, who was not shown to be the agent of his wife, could not charge with a mechanic's lien a house which he had caused to be erected on her real estate. The latter case merely announced that a building erected on premises, under a contract not shown to have been made with the owner or proprietor, could not be made the subject of a mechanic's lien. On the other hand in the case at bar, as has been seen, the contract for the improvement was made with an owner of the land in the statutory sense. Hence under the plain language of the section cited the materialman was entitled to a lien against both the building and the lot to the extent of Clark's interest in the latter. If his ownership had continued to the date of the trial of this suit, appellant might have subjected his title to the land for whatever it was worth, as well as the building, to a lien for its material, but its right to subject the building alone is not conditioned in the statute upon the continuance of the title of the owner of the land at the time it contracted with him for the erection of the building, and hence appellant was not precluded from charging the building by the subsequent failure of Clark's title to the land.

Neither is this conclusion effected by the point actually decided in Ranson v. Sheehan, 78 Mo. 668, where it was held that a lien could not be enforced against a building where the

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land on which it was situated was not described as required in the statute. It is true in that case there are some remarks of commissioner Phillips to the effect that the supreme court had held in a case like the one before him, that a lien upon the building must always depend upon the obtention of a lien on the land, in support of which he referred to Williams v. Porter, 51 Mo. 441. He expressly says, however, that his personal views would be otherwise, under the plain language of the statute, if he were free to express it. It will be observed that the commissioner apparently overlooked the later decision of the supreme court in Kansas City Hotel Company v. Sauer, 65 Mo. 279, where the view of the supreme court as announced by Judge Sherwood is exactly the reverse of that ascribed to it by the commissioner. It will be further noted that Judge Sherwood, the only member of the court as it was then constituted, who is now a member of that body, dissented *in toto* to the decision of commissioner Phillips. Under these circumstances the remarks in that case, beyond the point in judgment, can not be held authoritative, opposed as they are to the latest previous decision of the supreme court, and being also in the teeth of the statute.

The declarations of law requested by appellant are in accord with the views expressed in this opinion, and should have been given by the trial judge. For this error in refusing them, and giving contrary instructions on defendants' behalf the judgment herein is reversed and the cause remanded.

Judge *Bland* concurs; Judge *Biggs* dissents.

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ROSE KAHN, Appellant, v. HERMAN OVERSTOLZ et al., Respondents.

St. Louis Court of Appeals, December 12, 1899.

1. **Promissory Note**: BY CO-PARTNERSHIP: PRESUMPTION REBUTTED. Though a promissory note is admitted to be in the name of the co-partnership, the presumption of liability created by it against all the members of the co-partnership is only *prima facie;* and the court trying the case, if the testimony tends to show that the note was executed for the individual debt of a member of the firm, and the holder of the note knew that fact, would have the right to find against the presumption arising from the face of the note, and for the party denying partnership indebtedness.

2. ———: ———: PROVINCE OF THE TRIER OF THE FACT. It is the province of the jury or trier of the fact to determine the credibility of witnesses and the weight of their testimony, and when that has been done, as in this case, by a trial judge sitting as a jury, his findings will not be reversed, except upon the clear evidence of unjudicial bias. It not appearing from the circumstances in the record, that the judge was prejudiced in his findings, his conclusion in this behalf, is final.

Appeal from the St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Virgil Rule and *Johnson & Steinwender* for appellant.

(1) Upon the fact of the evidence the judgment in both cases should have been for the plaintiff. The firm of Schubach's Ticket Office was a trading copartnership, and as such, its individual members were *prima facie*, jointly and severally bound by a note given by one of them in the firm name, even though in fraud of the other members, and in the absence of notice. If the notes were given for the individual use of the member of the firm uttering them, the burden of proof was on the defendants to show that the plaintiff had full knowledge of that fact, and was not, as the lower court ruled in this case,

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on the plaintiffs to show that the other members of the firm had knowledge of its being given, and either tacitly or actually assented thereto. Mylins v. Young, 7 Mo. 1; Hayner v. Crow, 79 Mo. 293; Midland Bank v. Schoen, 123 Mo. 650; s. c., 56 Mo. App. 160; Meader v. Malcolm, 78 Mo. 550-53; Feurt v. Brown, 23 Mo. App. 336; Webb v. Allington, 27 Mo. App. 568. (2) Where one of two innocent parties must suffer by the act of a third party, he must suffer who has been the cause or occasion of the confidence or credit reposed in such third person. Hayner v. Crow, 79 Mo. 293.

Lubke & Muench for respondent.

Even waiving, the question of fact which has been decided against appellants, we submit that on the law, also, they are wrong. The authority of one partner to bind the other (in the absence of knowledge or consent) is confined to cases where the note is given in the usual course of the partnership business, or for property which the partnership usually deals in. Bank v. Schoen, 123 Mo. 650. In this case the business of the partnership was to buy and sell railroad tickets. That is not a "mercantile business." The borrowing of money was a mere occasional incident in the necessities of the business, and was then done in bank on collaterals, or from one relative of the defendant. In no sense was it a general trading firm, the scope of whose business would naturally require the several members of the partnership to go about borrowing money from whom they might. Hence there was no implied power to make this note. Deardorf v. Thatcher, 78 Mo. 128; Webb v. Allington, 27 Mo. App. 559. But the latter case was overruled in Deardorf v. Thatcher, *supra*, in so far as it holds that *prima facie* the note of any firm is binding on all the partners; and in the last case the rule is held to apply solely to mercantile firms. When appellants, in the concluding paragraph of their brief, declare that there is no question as to the *bona fides* of the giving of the two notes sued on, and no question as to

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Marx believing that he was dealing with the firm instead of Schubach individually we are forced to utterly deny those propositions. Our denial is based upon the record in these cases, and that record furnishes the proof that these notes were for loans originally made to Schubach, and only attempted to be contorted into a firm debt when it suited these closely related parties to try to saddle the individual obligation of one partner upon the other. That the lower court declined to have itself imposed upon by so apparent a trick of these parties is largely to its credit, and its finding should not be disturbed.

BOND, J.—Schubach and Marx were copartners engaged in buying and selling tickets for the transportation of persons by carriers. In October, 1896, Marx sold out his interest in the firm to defendant Overstolz for $2,500. Thereupon Schubach and Overstolz continued the business under the firm name and style of Schubach's Ticket Office, and agreed between themselves to purchase for the use of the firm a membership in the American Ticket Brokers Association, owned by one Stockbridge, at the price of $2,500, $1,500 of which was to be contributed by Overstolz, and $1,000 by Schubach. To this end Overstolz paid his part, and Schubach got $1,000 from plaintiff and contributed it as his part, giving to her agent therefor a note for that sum. In reference to the signature of this note plaintiff's witness states it was signed like the one in suit, "Schubach Ticket Office, A. Schubach." Defendant testified that the only signature affixed to it was "Albert Schubach." Both that note and the one in renewal thereof, upon which this action is brought, recited "I promise to pay, etc." The evidence shows that the money received upon the note to plaintiff was charged on the books of the concern to the investment account of A. Schubach; that the interest on this note was paid and charged to the individual account of A. Schubach. This suit is upon the renewal note. Defendant Overstolz answered under oath, averring the non-

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execution of the note by him or his firm, want of title in the plaintiff, and no consideration to himself or to his firm. The cause was submitted to the court without a jury. No instructions were asked or given, and a judgment in favor of Overstolz was rendered, from which plaintiff appealed.

Conceding that the copartnership to which respondent belonged was so far a trading one as to authorize its members to excute notes in its name, the presumption of liability thus created against all the members of the firm is *prima facie* not conclusive. Bank v. Schoen, 123 Mo. 650; Deardorf v. Thatcher, 78 Mo. 128. Hence the trier of the facts upon the adduction of evidence tending to show that the note in suit was not executed for a partnership purpose but for the individual debt of a member of the firm, and that this fact was known to the holder, had the right to find against the presumption arising from the face of the note and the oral evidence supporting that presumption. The law is, that it is the exclusive and constitutional province of the jury or triers of the fact to determine the credibility of witnesses and the weight of their testimony, and when, as in the present case, this has been done by a trial judge sitting as a jury, his finding as to the facts will not be reversed on appeal, except upon clear evidence of unjudicial bias. In this case the learned circuit court judge had all the parties before him, and could see and mark their demeanor and manner of testifying, the nature of their answers, whether frank and unreserved, or evasive and shifty. He evidently concluded that the preponderance of the evidence did not show that plaintiff's agent, who conducted the loan, was not aware that the borrower Schubach was seeking the money for his individual account. There are many and cogent circumstances supporting this view arising from the testimony showing that Schubach gave the original note as his personal obligation; that the intermediary who effected the loan was Schubach's brother-in-law and former partner, and

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therefore naturally cognizant of his, Schubach's affairs. Besides, the undisputed evidence showed that the money realized upon the note was actually used by Schubach as his private contribution to the firm. In addition to all this the wording of the notes themselves did not indicate a joint obligation to pay. These and other circumstances in the record fully acquit the learned trial judge of a willful disregard of unimpeached evidence. His conclusion is therefore binding on us.

Something is said in appellant's brief as to the rulings of the court upon the evidence introduced on the trial. An inspection of the abstract fails to show that any exceptions to the admission or rejection of evidence were taken during the course of the trial. The point suggested is not therefore before us for review. The judgment in this case is affirmed. All concur.

STATE OF MISSOURI ex rel., JOHN H. POHLMAN, Sheriff, Respondent, v. ISAAC M. MASON, Auditor of the City of St. Louis, Appellant.

St. Louis Court of Appeals, December 12, 1899.

1. **Officers**: FEES: STATUTORY RIGHT. No officer is entitled to fees of any kind for any service, unless they are provided for by statute and the statute allowing such fees must be strictly construed.

2. **Criminal Court Abolished**: JURISDICTION IN CIRCUIT COURTS. By section 6, Session Acts of 1895, page 132, the St. Louis Criminal Court is abolished and its jurisdiction is transferred and vested in the St. Louis Circuit Court.

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3. ———: ———: JURISDICTION, HOW GOVERNED. A court is civil or criminal, or both, according to the character of the causes it has authority or jurisdiction to hear and determine. The name by which it is designated may add force to its character, but can not control its powers or jurisdiction.

4. ———: ———: ———: ASSIGNMENT OF CASES. When the assignment of cases was made, the circuit judges so assigned took the place of and succeeded to the jurisdiction of the former criminal courts, and are to all intents and purposes criminal courts, with authority to exercise criminal jurisdiction only.

5. ———: ———: MANDAMUS. The fees claimed by the sheriff not being allowed by the statute, the approval of the judges thereof were without authority, and the judgment making the writ absolute is hereby reversed.

Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

REVERSED.

B. Schnurmacher and *Chas. Claflin Allen* for appellant.

Although the sheriff of the city of St. Louis is required by statute to attend the courts trying criminal causes, yet, as no fee is allowed him by statute for such attendance, he is not entitled to compensation therefor from the city. State ex rel. Troll, Sheriff, v. Brown, Auditor, 146 Mo. 401. And, for the same reason, the sheriff is not entitled to compensation for summoning standing juries for said courts. Section 4990, which provides for his compensation in connection with criminal causes, makes no allowance for services of either kind above referred to, and claimed in this proceeding.

(1) The law relating to sheriff of the city of St. Louis, distinguishes between fees and compensation of the office. See Appendix to Revised Statutes 1889, p. 2159, sections 7, 8 and 9. (2) The *per diem* of the sheriff for attendance in court by himself and deputies, is not fees in criminal or civil cases, but

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is compensation and emoluments of the office as distinguished by the statute above quoted. (3) Section 4989, Revised Statutes 1889, re-enacted in 1891—Sess. Acts 1891, p. 145, sec. 10, makes provision for a *per diem* to the sheriff for attendance at court by himself and deputies in addition to his fees in the cases. (4) The case of State ex rel. Troll v. Brown, is not in point. That was brought to compel the auditor to allow Sheriff Troll's *per diem* for attending the St. Louis Criminal Court, and St. Louis Court of Criminal Correction. This proceeding is to compel the auditor to allow the sheriff's *per diem* for attending circuit courts.

BLAND, J.—For attendance of himself and his deputies in Division No. 8 of the St. Louis Circuit Court, and for summoning four standing juries for said court during the December Term, 1898, thereof, the sheriff presented his bill amounting to $303.60, to the judge presiding in said division No. 8 for approval. The judge examined and approved the bill, and certified it to be correct. A like bill for the same amount, for like services for the same term of court held in division No. 9, was approved and certified to be correct by the judge of that division. These bills were presented to Mason, city auditor, for payment, but payment was refused, on the ground that divisions numbers 8 and 9 of the circuit court, were confined to the exercise of criminal jurisdiction only, and that there was no statute allowing the fees claimed in criminal cases. The sheriff then sued out an alternative writ of mandamus against the auditor, which was on hearing in the circuit court made peremptory. After an unsuccessful motion for rehearing the auditor appealed.

It is admitted that divisions numbers 8 and 9 are the criminal divisions of the St. Louis Circuit Court. To reverse the judgment the auditor relies on the decision of the supreme court in State ex rel. v. Brown, 146 Mo. 401, wherein it was

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held that a sheriff was not entitled to fees for himself and deputies for attendance on the sessions of the St. Louis Criminal Court and Court of Criminal Correction, although it was made his duty by statute to attend said court; that the statute allowing these fees has reference to civil courts only. If, therefore, divisions numbers 8 and 9 of the St. Louis Circuit Court are criminal courts, the sheriff is not entitled to the fee he claims. A court is civil or criminal, or both, according to the character of causes it has authority or jurisdiction to hear and determine. The name by which it is designated may add force to its character, but can not control its powers or jurisdiction. By section 6, Session Acts of 1895, page 132, the St. Louis Criminal Court is abolished and its jurisdiction is transferred and vested in the St. Louis Circuit Court. Section 13 of the Act provides the manner and means for the exercise of this jurisdiction after the first Monday in January, 1897, by the circuit court. By this section the judges of the circuit court of St. Louis, sitting in general term, are required to assign two or more of their number, who shall sit separately for the trial of criminal causes, and for the disposition of other criminal business. The judges so assigned are, after tho assignment is made and during its continuance, confined to the transaction of criminal business exclusively. When these assignments were made, the circuit judges so assigned took the place of and succeeded to the jurisdiction of the former criminal courts, and are to all intents and purposes criminal courts, with authority to exercise criminal jurisdiction only. We therefore hold on the authority of State ex rel. v. Brown, *supra*, that the sheriff was not entitled to the fees claimed and reverse the judgment. All concur.

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ERNST G. WACHTER, Plaintiff in Error, v. JOHN C. HEMAN, Defendant in Error.

St. Louis Court of Appeals, December 12, 1899.

1. **Equity Suit:** DISSOLUTION OF PARTNERSHIP: PARTNERSHIP AGREEMENT EXECUTORY. A suit in equity to dissolve a co-partnership agreement, contingent, never consummated and no earned profits for distribution, is not maintainable.

2. ———: ———: ———: REMEDY: ACTION AT LAW. Where the agreement to form a co-partnership remains contingent, and is abandoned by one of the parties, the action by the other is one at law for breach of the agreement.

Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

AFFIRMED.

Frederick A. Wind for plaintiff in error.

The agreement constituted plaintiff and defendant partners. (a) They were jointly interested in the net profits (b) Both contemplated ownership in common in the horses bought and to be bought. (c) They adopted and used a firm name. Macloy v. Freeman, 48 Mo. 234; Lengle v. Smith, 48 Mo. 276; Plummer v. Frost, 81 Mo. 425; Deyerle v. Henet, 50 App. 541.

No brief for defendant in error.

BIGGS, J.—This is an action in equity in which the plaintiff seeks the dissolution of an alleged partnership between him and defendant, and the appointment of a receiver to take charge of the partnership property and for an accounting.

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The averments of the bill are to the effect that in 1895, the plaintiff and defendant entered into a partnership agreement to buy and race thoroughbred horses; that plaintiff was to select the horses and train them; that defendant was to advance the money to buy the horses and to pay for their keep; that the sums of money so furnished should be repaid to defendant out of the first earnings of the horses, and after that the profits of the business were to be equally divided between the parties. Then follow allegations of the purchase of certain horses, of the amount of money advanced by defendant, of the earnings of the horses, the amount refunded to defendant, the balance due defendant on account of advances, and that the defendant had wrongfully taken possession of the horses and denied that plaintiff had any property interest in them.

The answer is a general denial.

At the hearing the circuit court dismissed the bill, and from the judgment of dismissal the plaintiff has prosecuted a writ of error.

The evidence of plaintiff tends to prove the averments in the bill. In defense of the action the defendant testified that the agreement as to the partnership was executory and contingent, that is the plaintiff was to have an equal interest with defendant in the horses when they won sufficient money to reimburse defendant for advances. He further testified that at the time he took possession of the horses he had not been fully reimbursed, a fact that the plaintiff conceded. In corroboration of this testimony the defendant introduced two witnesses who testified that plaintiff admitted to them that the agreement was as testified to by defendant. Evidently the circuit court accepted this view of the evidence, which we think was justifiable. Was it right in dismissing the bill? Unquestionably so. The agreement of the defendant to admit plaintiff into a co-partnership with him was executory and con-

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tingent, and under it the plaintiff could claim no existing interest in the horses. Neither did he have any interest in the earned profits, for he admits that they were insufficient to fully reimburse defendant for his outlays. If the defendant violated this agreement, or has put it out of his power to perform it, the remedy of the plaintiff is an action at law for damages for its breach. Haskins v. Burr, 106 Mass. 48; Hoile v. York, 27 Wis. 209; Wiggins v. Graham, 51 Mo. 17.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It is so ordered.

NATIONAL HOME BUILDING AND LOAN ASSOCIATION, Appellant, v. SCUDDER-GALE GROCER COMPANY, Respondent. 82 245 / 91 47

St. Louis Court of Appeals, December 12, 1899.

1. **Purchaser:** PROPERTY MORTGAGED: ASSUMPTION OF DEBT. Where the testimony shows that the purchaser took the property just like the seller, held it to pay the dues and the mortgage debt, or to do as he liked about it, and the trial court finding tnat he did not assume the mortgage debt, such finding will be acceded to and the judgment affirmed.

2. ———: ———: ———: FINDINGS OF COURT. Every reasonable intendment or inference to be drawn from the evidence in support of the trial court, must be adopted.

3. ———: ———: ———: SUBJECT TO THE MORTGAGE. The fact that the deed to respondent, provided for the payment of the taxes on the land, and mentioned that the property was subject to the mortgage, it is but reasonable, that if respondent was to pay mortgage debt, a covenant to that effect would most likely have been inserted in the deed, and its not having been done, is strong and persuasive evidence that respondent did not agree as a part of the consideration of the deed, to pay off the incumbrance.

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Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

AFFIRMED.

Sturdevant & Sturdevant and *J. R. Long* for appellant.

(1) A parol agreement by the grantee of real estate with his grantor to assume and pay off an existing incumbrance thereon is valid and binding upon the grantee, and may be enforced by the holder of such incumbrance, and that such an agreement is not in violation of the statute of frauds. 2 Devlin on Deeds, sec. 1037; Lamb v. Tucker, 42 Iowa, 118; Putney v. Forham, 27 Wis. 187; Merriman v. Moore, 90 Pa. St. 78; Wilson v. King, 23 N. J. Eq. 150; Burnham v. Dorr, 72 Mainé, 198; Drury v. Holden, 121 Ill. 128; Lock v. Homer, 131 Mass. 93-102. (2) An agreement with the owner of real estate by the purchaser to pay off an incumbrance thereon, as a part of the consideration thereof, rests upon a valuable and sufficient consideration, and such an agreement may be enforced by any payee of such incumbrance. Drury v. Holden, 121 Ill. 130; Merriman v. Moore, 90 Pa. St. 78; Bay v. Williams, 112 Ill. 91; Horr v. Murphy, 45 Neb. 809; Enos v. Sanger, 96 Wis. 150. An action based upon contract executed in and governed by the laws of a foreign state, the laws of such foreign state are competent evidence for the purpose of showing the construction and liability upon such contract in the state where made, without being pleaded. Halch v. Hanson, 46 Mo. App. 323; Robertson v. Wabash, 84 Mo. 121; State v. Payels, 92 Mo. 310.

W. B. Homer for respondent.

(1) The burden of proving the contract alleged is upon the plaintiff. In a case like the present, where there is a

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deed made, all doubts are resolved against the grantor, and if the court should be of the opinion that a verbal promise will sustain the alleged contract, then this promise must be clearly proven, and greater weight will be given to written documents than to oral testimony. Rapp v. Stoner, 104 Ill. 624; 16 Am. and Eng. Ency. of Law (Note 1), p. 892. (2) The fact that a party recognizes a mortgage and pays interest on it, is no agreement, or evidence of an agreement, to pay the mortgage itself. Fiske v. Tolman, 124 Mass. 254. (3) Under the law of Missouri, there can be no claim of the plaintiff's right to recover in this case. Hicks v. Hamilton, 144 Mo. 495; Crone v. Stinde, 68 Mo. App. 122. Under the allegations of the petition, the Illinois opinions were not properly received in evidence. Clark v. Barnes, 58 Mo. App. 670; Garrett v. Conklin, 52 Mo. App. 654. (4) The plaintiff failed to prove any deed made by Martha E. Wright, conveying any property at all to the defendant. McFadden v. Rogers, 70 Mo. 425; Bradley v. Railroad, 91 Mo. 498; Rosh v. Brown, 101 Mo. 590.

BIGGS, J.—The plaintiff is an Illinois corporation. In 1890 one Isabel R. Drake subscribed for five shares of its stock. In January, 1891, she borrowed $500 of the association, for which she gave her note payable in monthly installments until the series in which her stock was placed fully matured. To secure this loan she transferred her certificate of stock to the plaintiff, and she also executed a mortgage to it on a lot owned by her and situated in Creal Springs, Illinois. Subsequently, to wit, in August, 1892, the title to the lot by mesne conveyances was vested in Martha E. Wright, wife of W. F. Wright. The lot was conveyed to Mrs. Wright subject to the aforesaid mortgage. In 1894, W. F. Wright became indebted to the defendant (a Missouri corporation), in the sum of $119. In payment of his debt the defendant, through one Eubanks, its local agent at Creal Springs (who

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was also the agent of the plaintiff at that place), agreed to accept a deed from Mrs. Wright to the lot in question. The deed recited a consideration of $500, and that the defendant was to pay the taxes then due on the property, and it contained the further recital that the lot was conveyed subject to the aforesaid mortgage. Some time after the purchase by defendant default was made in the payment of the instalments due plaintiff on the debt. The present action is brought by plaintiff to charge the defendant with the payment of the balance due on the note. The plaintiff predicates its right of recovery on an alleged parol agreement by Eubanks that defendant would, as part of the consideration of the transfer of the lot from Mrs. Wright assume and pay the mortgage debt. The defendant denied liability. The cause was submitted to the court without the intervention of a jury. At the conclusion of the trial the court, in accordance with the request of the parties, made the following written findings of fact, to wit:

"The court finds that the facts of this case are as follows: The plaintiff is a building and loan association, a corporation organized and doing business under the laws of the state of Illinois, with its principal place of business at Bloomington, Illinois. The defendant is a corporation organized under the laws of the state of Missouri, having its principal place of business at the city of St. Louis, Missouri.

"On the twenty-second day of January, 1891, one Isabell R. Drake executed a bond for $500, to the plaintiff and made a mortgage to secure said bond on the following described property, situated in the county of Williamson in the state of Illinois to wit: The west half of lot one, in block three, in the second survey to Creal Springs.

"Prior to the date of making said bond and mortgage the said Isabell R. Drake was the owner of five shares of stock in the said plaintiff corporation. On the twenty-third day of January, 1891, said Isabell R. Drake and her husband conveyed the property in question to W. A. Phelps, J. C. Phelps,

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and T. M. Phelps, by which deed the grantees agreed to pay the aforesaid mortgage.

"On the twenty-fifth day of February, 1891, J. C. Phelps and wife conveyed the said property to W. A. Phelps and T. M. Phelps, which deed was made 'subject to one certain mortgage held by the National Home Building & Loan Association, of Bloomington, Illinois, for $500.'

"On the twenty-sixth day of August, 1891, T. M. Phelps and wife conveyed by deed said property to W. A. Phelps, in which deed there was no reference made to the aforesaid mortgage.

"On the fifth day of March, 1892, W. A. Phelps and wife conveyed the property in question to W. H. Willeford and W. F. Wright, in which deed there was no reference made to the said mortgage.

"On the sixteenth day of August, 1892, by deed W. F. Wright, W. H. Willeford and Susie E. Willeford, his wife, conveyed said property to Martha E. Wright, in which deed there was no reference made to said mortgage.

"Martha E. Wright is the wife of W. F. Wright. I do not find that the stock in the said plaintiff corporation had been transferred to the successive grantees of said land.

"Prior to April 7, 1894, the defendant had obtained a judgment against W. F. Wright. One Eubanks represented the defendant at Creal Springs, in Illinois, in attempting to collect this judgment, and for the purpose of satisfying the judgment, the paper offered in evidence under the date of April 7, 1894, was delivered to defendants herein. This paper was executed by Martha E. Wright and W. F. Wright, her husband. W. F. Wright, prior to the execution of the paper last referred to, which paper contains the names of no grantors, had a conversation with Eubanks, and I find that the defendant did not, by virtue of said conversation, or at any other time, assume or agree to pay the mortgage hereinbefore referred to.

"I find that the defendant paid to the plaintiff on the

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twenty-second day of May, 1894, $9.12; on the third day of July, 1894, $9.12, and on the tenth day of October, 1894, $36.84.

"I do not find that the said stock in the plaintiff corporation was assigned to the defendant.

"I do not find under the evidence that either W. F. Wright or Martha E. Wright assumed or agreed to pay the bond or mortgage referred to hereinbefore.

"I find that under the laws of the state of Illinois, if a grantee in a deed assumes and agrees to pay a mortgage which his grantor has not assumed and agreed to pay, under the laws of Illinois such agreement, if part of the consideration of the conveyance of the real estate so mortgaged, would be binding upon the grantee.

"I find that the defendant did not assume and agree to pay the mortgage in question as a part of the consideration of any conveyance to them."

Judgment was rendered for defendant and plaintiff appeals.

The appellant rest its case upon the single proposition that the finding of the court that the defendant did not orally or otherwise agree to assume and pay the mortgage debt, is opposed to all the evidence. If appellant is wrong in this, it is conceded by counsel that the judgment should be affirmed. For the purpose of disposing of this assignment a full abstract of all testimony bearing on the question should have been presented by appellant. Its attorneys have only met this requirement in a measure. However we have overlooked this violation of the rules of practice, and have given the evidence, which is contained in a voluminous transcript, a careful consideration, and have concluded that the assignment of error must be overruled. In support of the contention the appellant relies upon the testimony of W. F. Wright and certain letters written by defendant to plaintiff. In his examination in chief Wright stated that Eubanks agreed that defendant

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should pay the mortgage debt. On his cross-examination he said: "Why I told him (Eubanks) I wanted to trade them the property on that debt, I told him it has the loan on it, which he already knew was on it; I told him I wanted to trade him the property and let him take it, just as I had it, take the responsibility of the loan, pay the dues or pay the mortgage and raise the property, or do as they liked about it, he said he would write them and see if that proposition suited."

"Q. What next was done? A. The next time I saw him he had got an answer from them asking him some questions about it which he answered himself."

"Q. What did he next do or say? A. He let me know in a very short time that the trade was all right, that they would make the trade, that they accepted the proposition that I made to them, they would take the property as I had it in lieu of the debt that I owed them." The defendant paid the monthly instalments on the stock for a short time, and during the time it had some correspondence with plaintiff concerning alleged defaults occurring prior to defendant's purchase. In some of those letters the defendant made the statement that it "assumed the payment of the mortgage debt." On the other side of the question is the deed itself, which expressly recites that the defendant was to pay the taxes due on the property, and that the property was sold subject to the mortgage.

Every reasonable intendment or inference to be drawn from the evidence in support of the conclusion of the trial court must be adopted. Now, it is fairly to be inferred from the testimony of Wright that under the terms of sale the defendant had the option to pay or not to pay the mortgage debt as it might seem proper, for he says "it (defendant) was to take it (the property), just like I had it, take the responsibility of the loan, pay the dues or pay the mortgage and raise the property, or do as they (defendant) liked about it." It is undisputed that Wright and his wife held the property free from any personal obligation to pay the debt. The expres-

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sions in the letters may well be read in a qualified sense that is that defendant must satisfy the mortgage if it expected to reap any advantage from its purchase. It is stated therein that defendant was to pay the taxes on the land. If it was also understood that it was to pay the mortgage debt, it is but reasonable that this covenant would likewise have been inserted. That it was not so inserted, but on the contrary expressly stated that the conveyance was made subject to the mortgage, is strong and persuasive evidence that the defendant did not agree, as a part of the consideration of the deed, to pay off the incumbrance. It is useless to extend the discussion.

The judgment of the circuit court will be affirmed. All concur; *Bland* in the result.

JOHN O. F. DELANEY, Respondent, v. SAMUEL BOWMAN, Appellant.

St. Louis Court of Appeals, December 12, 1899.

1. **Trespass on Case:** VOLUNTARY UNDERTAKING: BINDING. Appellant wishing to do some excavating on his lot wrote respondent, the owner of an adjoining lot upon which was a building, notifying him to provide lateral support for a portion of the wall of his building, saying that he would leave sufficient earth to protect the other part of the wall. But the amount of earth left proved insufficient along that part of the wall which respondent agreed to protect: Held, that respondent had a right to rely on the promises of appellant though voluntarily given.

2. ———: PLEADING: NEGLIGENCE. In an action based on the facts showing negligence, if sufficient facts can be gathered from the averments to make out a case, however imperfectly stated, evidence is properly admitted in proof of the averments of the petition.

3. ———: INSTRUCTION: ERROR: NOT REVERSIBLE. To warrant a reversal of a judgment on account of an erroneous instruction, the error must be prejudicial to appellant.

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Appeal from the St. Louis City Circuit Court.—*Hon. Selden P. Spencer*, Judge.

AFFIRMED.

W. M. Kinsey and *George E. Smith* for appellant.

(1) Underlying every question arising in this case, is the fundamental legal proposition that it was primarily the duty of plaintiff to protect his own wall from falling, upon being notified that defendant was about to excavate the adjoining lot. Larson v. Railway, 110 Mo. 234; Charless v. Rankin, 22 Mo. 566; Eads v. Gains, 58 Mo. App. 586; Obert v. Dunn, 140 Mo. 476. (2) If defendant's letter can be construed into a promise out of which a contract arose, such contract is not one importing a consideration under any statute of this state or at common law. It was necessary, therefore, in order to recover on this alleged promise, to aver and prove the consideration supporting it, otherwise it is a mere *nudum pactum* and will not support an action. Bliss, Code Pldg. [3 Ed.], sec. 308; 4 Enc. Pleading and Practice, 928; County of Montgomery v. Auchley, 92 Mo. 126. (3) Ordinary care under the circumstances, was all the law required of defendant. To require the exercise of prudence or the care and prudence of an experienced excavator, placed the standard too high. Larson v. Railway, *supra*. (4) Actionable negligence can not be predicated upon a failure to perform a promise where no reliance upon the promise is alleged or shown. Negligence is an ultimate substantive fact which must be both alleged and proved. Bliss on Code Pldg. [3 Ed.], secs. 211, 310; Crane v. Railway, 87 Mo. 595. The court erred, therefore, in receiving any testimony in support of plaintiff's petition, upon the theory that it stated a cause of action in either count based upon negligence.

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T. K. Skinner and *C. R. Skinner* for respondent.

(1) Defendant's letter relieved plaintiff of the duty of supporting his wall beyond the point indicated in the letter. This is not upon the ground that the letter constituted a contract, though it was a promise, but upon the ground that it constituted an assurance upon which plaintiff had a right to rely. Walters v. Hamilton, 75 Mo. App. 238; Larson v. Railway, 110 Mo. 234. (2) The rules on this subject are well settled. Thus it is held that a petition which impliedly states a cause of action, and is not attacked by demurrer or motion to make more definite, will be held good after verdict. This doctrine rests on the presumption that plaintiff proved on the trial the facts imperfectly alleged, the existence of which was essential to his recovery. As it affirmatively appears in this case that plaintiff did make this proof, the rule applies with double force. Mumford v. Keet, 65 Mo. App. 502; Bank v. Scalzo, 127 Mo. 188; Bank v. Leyser, 116 Mo. 73. (3) It is enough if the matter which ought to have been explicitly stated may be gathered from other allegations of the petition. Peck v. Bridwell, 10 Mo. App. 524; State v. Carroll, 9 Mo. App. 275. (4) By pleading to the merits the defendant waived objection to the defect in this petition, if there was a defect. Buck v. Railway, 46 Mo. App. 562; Bassett v. Tel. Co., 48 Mo. App. 566.

BIGGS, J.—In 1895 the plaintiff owned a brick building situated on a lot fronting on the north side of Franklin avenue in the city of St. Louis. The front portion of the building, which is three stories high, extends north from the avenue sixty feet, to which is attached in the rear a one-story building forty feet in length, making the entire length of the structure one hundred feet. The defendant owned the lot adjoining on the east. In March, 1895, the defendant com-

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menced the erection of a building on his lot. Before or just after the work was begun he addressed the following letter to plaintiff:

"Dear Sir:—We have heretofore notified you to protect the wall on the lot adjoining, where we are excavating for our new building, on the northwest corner of Franklin avenue and Eleventh street. It will be necessary for you to underpin or put foundation under about eight or ten feet of the one story extension of your building. We will leave an area adjoining your wall from that point to the alley, so that the balance of your building will be protected."

In pursuance of this letter the plaintiff had the wall of his building underpinned and otherwise secured for a distance of seventy feet back from the street and left the remaining thirty feet to be protected by defendant. In making the excavation for the cellar and foundation of the new building at a point seventy feet from the avenue the defendant made a jog to the east, leaving an alley four and one-half feet in width between the rear portions of the buildings. After the excavation for that portion of the cellar had been made, the earth gave away along the alley, causing the rear portion of the east wall to plaintiff's one-story building to fall into the excavation. The plaintiff had the wall reconstructed at a cost of $575. He sues in this action to recover compensation for the injury done to his building. The petition contained two counts. We have only to deal with the second, as the circuit court withdrew the first from the consideration of the jury.

The second count is as follows: "For another and further cause of action, plaintiff states that heretofore, to wit, in the month of May, 1895, he was the owner of a lot of ground in city block No. 265, of the city of St. Louis, Missouri, with a building thereon, known as Nos. 1107 and 1109 Franklin avenue; that at said time defendant made a wide and deep excavation in and upon another lot close to and adjoining

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plaintiff's said lot and building thereon; that at and before the time of making such excavation defendant notified plaintiff that it would be necessary for him (plaintiff), to put a foundation under a certain portion of the wall of plaintiff's said building, indicated by defendant, and further notified and promised plaintiff that defendant would leave an area of earth adjoining the rest of said wall and building; that in pursuance of said notice plaintiff did put a foundation under the portion of said wall so indicated by defendant, but that in disregard of his said notification and promise defendant did not leave an area adjoining the rest of plaintiff's said wall sufficient to protect the same, but on the contrary left an area of earth upon his said lot so narrow and made his said excavation so deep and so close to the rest of plaintiff's said wall, that the said area caved in and carried with it, threw down and destroyed plaintiff's said building and wall, to the plaintiff's damage in the sum of one thousand dollars, for which sum and his costs plaintiff prays judgment."

The answer of defendant is a general denial.

Under the instructions of the court the jury returned a verdict for $575 in favor of plaintiff, upon which a judgment was rendered. The defendant has appealed.

The defendant objected to the introduction of any evidence in support of the second count, for the alleged reasons that if it was intended to declare on a contract and its breach, there was no averment of a consideration for or an acceptance of the promise made in defendant's letter. Or, if liability was intended to be predicated upon the negligence of defendant in failing to properly protect the wall, the averments were not sufficient for that purpose. Technically speaking, the action is not *ex contractu* but *ex delicto*. In making the proposed improvement the defendant voluntarily promised to protect the rear portion of the east wall of plaintiff's building. The plaintiff had the right to rely on this promise, although voluntarily made (Larson v. Railway, 110 Mo. loc. cit. 244).

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The plaintiff's right of recovery rests upon the negligent performance of this undertaking. If sufficient facts can be gathered from the averments to make out such a case, however imperfectly stated, the objection to the admission of evidence was properly overruled. It is stated in the petition "that in pursuance of said notice (letter) plaintiff did put a foundation under the portion of said wall so indicated by defendant." From this the further averment ought to be implied, that the plaintiff did not protect the rear portion of his wall, but relied upon the promise of the defendant to do so. Hence the objection that the petition fails to aver that plaintiff relied on the promise of defendant to leave a sufficient area to protect his wall, is not well founded. Continuing the petition states: "that in disregard of his said notification and promise defendant did not leave an area adjoining the rest of plaintiff's said wall sufficient to protect the same, but on the contrary left an area of earth upon his said lot so narrow and made his excavation so deep and close to the rest of plaintiff's said wall that the said area caved in," etc. The promise of defendant implied that the area would be of sufficient width to permit plaintiff's wall from falling, or that the defendant would adopt such artificial means as to make it sufficient. In respect to these matters the petition fairly charges that the defendant was negligent. Our conclusion is that the circuit court was right in its ruling.

On its motion the court charged the jury as follows:

"Gentlemen of the Jury:—You will disregard the first count of this petition, for there is no evidence to sustain it. On the second count or claim of the petition, if from the evidence you believe that the plaintiff was the owner of a lot of ground on Franklin avenue, in the city of St. Louis, on which he had a building standing, and that defendant made an excavation on an adjoining lot, and in connection with such excavation defendant notified plaintiff that it would be necessary for the plaintiff to underpin or put a foundation under about

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eight or ten feet of the one-story extension to plaintiff's building and agreed that defendant would leave an area adjoining the wall of plaintiff from the point thus to be underpinned and extending to the alley so the balance of plaintiff's building not thus required to be underpinned would be protected, then it was the duty of the defendant to leave an area, adjoining the wall in such condition or of such character as would be left under all the circumstances shown in this case, by a man of ordinary prudence and experience and care in such a line of business to protect plaintiff's building."

"If you believe the defendant under all the circumstances shown in this case, did not exercise that care and precaution in regard to the area, as would have been exercised by one of ordinary prudence and experience in such business under similar circumstances to protect plaintiff's property, and that by reason of such failure on the part of defendant the building and wall of plaintiff was thrown down and destroyed, then your verdict should be for the plaintiff."

"If, on the other hand, you believe from the evidence that the defendant did all in regard to the area that a man of ordinary prudence and experience in such business would have done under the same circumstances, to protect the plaintiff's building, then your verdict should be for the defendant."

"If your verdict is for plaintiff, you will assess his damages at such a sum as you believe is the fair and reasonable amount of the damages done to plaintiff's property by the fall of the wall and building, as shown by the evidence in this case."

"If your verdict is for the defendant, you will simply so state in your verdict."

There was sufficient evidence to authorize the foregoing instruction. The instruction itself is open to some criticism, in that it fails to require the jury to find that the plaintiff relied on defendant's promise to protect the rear portion of his wall. The omission we think did the defendant no harm.

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All of the evidence tended to prove that the plaintiff did rely on the promise; that he underpinned the front portion of the wall, and that the defendant undertook to care for the rear part. If the jury had been required to find this fact, there can be no question what the finding would have been. Hence the defendant could not have been prejudiced. The statute provides, that a judgment shall not be reversed, unless the appellate court shall believe that error has been committed which materially affects the merits of the action. (Sec. 2303 R. S. 1889.) Under this statute an erroneous instruction must be prejudicial in order to warrant a reversal. Otto v. Bent, 48 Mo. 23; Pasley v. Kemp, 22 Mo. 409; Fitzgerald v. Baker, 96 Mo. 661.

The care imposed on the defendant by the instruction was not greater than that imposed by the law. It only required that in making the improvement the defendant should have used that degree of care that an ordinary prudent man engaged in such a business would have used under like circumstances.

The instruction does not ignore the defendant's testimony as to the condition of the foundation of plaintiff's wall, or the character of the ground upon which the wall was built. The jury were required in determining the issues, to take into consideration "all the circumstances shown in the case."

Other objections are urged against the instruction, which we need not notice. We have pointed out what we conceive to be the only error in the charge, and as that could not have been prejudicial to the defendant, the assignment of error will be overruled.

It is suggested that, as the plaintiff knew the width of the alley, and as he was as capable of judging of its sufficiency to protect his wall as the defendant, he could not complain that the means adopted by defendant for his protection were ineffectual. It is true that the agent of the plaintiff had knowledge of the width of the wall but it was not established that he

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knew the character of the soil as disclosed by the excavation, nor was he advised of the means adopted by defendant to prevent the accident. Under the promise of defendant he had the right to assume that defendant would adopt all reasonable means to prevent the sides of the excavation from caving.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It is so ordered.

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ST. LOUIS TRUST COMPANY, Respondent, v. AMERICAN REAL ESTATE AND INVESTMENT COMPANY, Appellant.

St. Louis Court of Appeals, December 12, 1899.

1. **Justice of Peace: STATEMENT: CONTRACT: CONDITION PRECEDENT: WAIVED. Suit on a subscription contract to a railway company to pay $1,000 conditioned, that building of road be commenced, and finished at and within certain times, the latter condition not being complied with by company, to maintain suit on such contract necessary to allege in statement, waiver of time by the party subscribing: Held, that the admission of evidence in support of statement that failed to allege an extension of time within which to complete railroad, was reversible error.**

2. **——: ——: ——. In suits before justices of the peace, it is only necessary that the statement of the cause of action should be sufficient to advise the other party of the claim against him, and to bar a second action therefor.**

3. **——: ——: ——: EXTENSION OF TIME. Upon all contracts where time is the essence, modifications thereof by waivers, except as to policies of insurance, can only be recovered upon, by alleging and proving such waivers.**

Appeal from the the St. Louis City Circuit Court.—*Hon. Franklin Ferris*, Judge.

REVERSED AND REMANDED.

No brief for appellant.

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Carter & Sager for defendant.

Plaintiff failed to comply with section 6138 of the Revised Statutes governing practice in justice courts, which provides that "before any process shall be issued in any suit the plaintiff shall file with the justice the instrument sued on, or a statement of the account, or of the facts constituting the cause of action, upon which the suit is founded." Olin v. Zeigler, 46 Mo. App. 193; Ins. Co. v. Foster, 56 Mo. App. 197. The extension agreement was without consideration and void. Parker v. Johnson, 32 N. J. Eq. 222; French v. Griffin, 18 N. J. Eq. 279-281; Beech on Contracts, sec. 777; Merrill v. Central Trust Co., 46 Mo. App. 237; Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578-593. It was error to admit the extension agreement in evidence as it constituted plaintiff's cause of action under the statute, and should have been filed before process had issued. It was not a waiver of any condition of the original contract; it was not an excuse for non-compliance nor had it any evidential character. It was an engraftment—a new contract which would permit recovery, on evidence insufficient under the original understanding. It was the cause of action, and should have been filed or pleaded. Lanitz v. King, 93 Mo. 513; Pier v. Heinrichoffen, 52 Mo. 333; Bank v. Hatch, 78 Mo. 13; Nichols v. Larkin, 79 Mo. 265; King v. Faist (160 Mass. 449), 31 N. E. Rep. 456.

BOND, J.—This suit was begun before a justice for the second instalment due upon a contract of subscription executed by defendant in the following terms:

"$1,000. St. Louis, Mo., June 7th, 1895.

"In consideration of the benefits and advantages accruing from the construction and operation of the railroad of the St. Louis and Kirkwood Railroad Company, I do hereby promise and agree to pay to the St. Louis Trust Company, the sum of one thousand dollars.

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"One-third of said amount to be paid thirty days after the road is completed and in operation from St. Louis to Meramec Highlands.

"One-third to be paid one year thereafter. The balance, one-third, to be paid two years thereafter; all without interest.

"Upon condition that work on said road is commenced within sixty days after date, and the said road completed within six months thereafter.

"Said subscription when paid by me to be held by said Trust Company in trust for the payment of interest on the bonds of the St. Louis and Kirkwood Railroad Company, and for operating expenses, improvements and betterments of said St. Louis and Kirkwood Railroad Company, and not for any other property."

Plaintiff had judgment before the justice, and defendant appealed to the circuit court. Upon a trial there an agreed statement of facts was filed, to wit:

"For the purposes of the trial of the above entitled cause the following are admitted by both parties hereto as facts:

"First. The work of constructing the railroad of the St. Louis and Kirkwood Railway Company was commenced on or about the 25th day of July, 1895.

"Second. That the railroad of the St. Louis and Kirkwood Railway Company was completed and in operation between St. Louis and Meramec Highlands on or about the fourteenth day of February, 1896.

"Either party, plaintiff or defendant, may introduce any legal testimony additional to the above admissions."

Thereupon plaintiff introduced in evidence, over defendant's objections, a letter written by defendant, to wit:

"December-January, 1896.

"To St. Louis & Kirkwood Railway Co.:

"In reply to your favor of December 23, 1895, I cheerfully acquiesce in the request contained therein, and hereby agree, in consideration of the statements therein made, that the

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limit of time for the completion and operation of your railway shall be set for the first day of March, 1896, the same as though that date was specified for the date of completion and operation of your railroad; and in my subscription, bearing date of June 7, for $1,000."

The cause was submitted to the court without a jury and judgment rendered for plaintiff for the amount sued for, and defendant appealed.

It is well settled that in suits before justices of the peace it is only necessary that the statement of the cause of action should be sufficient to advise the other party of the claim against him and to bar a second action therefor. Doggett v. Blanke, 70 Mo. App. loc. cit. 502. But to this extent it is indispensable that the statement should go, and the cause of action therein alleged, and not another, is the only one which can be tried upon appeal from the justice's court. Revised Statutes 1889, sections 6138 and 6347. In the case at bar the cause of action rested upon the original contract of subscription coupled with the supplementary agreement extending the time of the performance of the work. These two writings constituted the contract between the parties when the suit was brought. Conceding that the latter was only a waiver of the condition expressed in the former as to the performance of the work within a specified time, still its assertion was essential to a recovery against defendant. For the agreed facts show that the work for which his subscription was secured was not performed within the time which it was required to be fininshed in order to bind him under his original agreement. It is well settled in this state that all contracts, modified by waivers, except policies of insurance, can only be recovered upon by alleging and proving such waivers. McCullough v. Ins. Co., 113 Mo. loc. cit. 616; Ehrlich v. Ins. Co., 103 Mo. loc. cit. 240; Lanitz v. King, 93 Mo. 513, and cases cited; Brownlow v. Wollard, 61 Mo. App. loc. cit. 132. In the case at bar the plaintiff neither filed with the justice the two

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written agreements constituting its cause of action against defendant, nor filed any statement in that court of its cause of action arising upon the execution of said written contracts by defendant. It did not, therefore, set forth the constitutive facts of its demand against defendant. For this reason also its statement before the justice was not sufficient to bar another action against defendant on account of the facts shown in evidence on the trial in the circuit court. Defendant saved his exception to the introduction in evidence in that court of his written agreement modifying the contract upon which he had been sued before the justice, because it had been neither filed nor pleaded in the suit brought by plaintiff. For the error of the court in receiving this evidence, its judgment is reversed and the cause remanded, with permission to plaintiff to amend its statement by referring therein to the written agreement of defendant as to the extension of time of performance of the original contract and to file the same, together with the original contract as exhibits to the statement. R. S. 1889, sec, 6347; Dowdy v. Wamble, 110 Mo. 280. It is so ordered. Judge *Bland* concurs; Judge *Biggs* dissents.

W. A. B. DALZELL, Appellant, v. THE COMMERCIAL BANK OF ST. LOUIS, Respondent.

St. Louis Court of Appeals, December 12, 1899.

1. **Bank:** ITS OWN STOCK: PLEDGED: NOT A PURCHASE. Ramsey by giving his note to the bank for $2,400 in payment of ten shares of its capital stock, which were by him transferred back to the bank as collateral security for the amount of the note, did not constitute a purchase by the bank of its own stock, directly or indirectly.

2. ———: ———: ———: AGAINST PUBLIC POLICY. To refuse a private banking corporation the right to accept a pledge of its own stock as security for past or present indebtedness, would unreasonably restrict its business for lending money, would injure the stockholder as much as the bank, and generally hamper commerce and be contrary to public policy.

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Appeal from the St. Louis City Circuit Court.—*Hon. Pembrook R. Flitcraft*, Judge.

AFFIRMED.

Geo. W. Taussig for appellant.

(1) The attempted pledge by Ramsey to the bank was a nullity, and conveyed to the bank no right, title, interest or lien of any kind or character as to said shares. Hotel Co. v. Furniture Co., 73 Mo. App. 135; Carriage Co. v. Hilbert, 24 Mo. App. 338; Bank v. Wulfekuhler, 19 Kan. 60; Abeles v. Cochran, 22 Kan. 405; see Gill v. Balis, 72 Mo. 424; Bank v. Kennedy, 167 U. S. 362; St. Louis Rawhide Co. v. Hill, 72 Mo. App. 143. (2) Whether or not a corporation may deal in its own shares is not simply a question between the state and the corporation or between the corporation and its creditors, but it is a question affecting the validity of the contract itself. Carriage Co. v. Hilbert, 24 Mo. App. 343; Central Trust Co. v. Pullman Co., 139 U. S. 24.

George S. Grover for respondent; *Geo. B. Burnett* and *Morton Jourdan* of counsel for respondent.

(1) No statute of Missouri has ever prohibited a state bank, such as this one was, from loaning money upon its own stock as security. Such a transaction is neither a purchase or sale of such stock, and, therefore, the authorities cited by counsel for plaintiff in his brief have no application to the case at bar. Nor can such a transaction be condemned as injurious to the public interest, as the public really have no concern in it. Cook on Corporations, sec. 311; Lumber Co. v. Foster, 49 Iowa, 25; Rollins v. Wagon Co., 80 Iowa, 380. (2) Nor can such a question be raised in a collateral proceeding such as this one is. Reinhard v. Lead Mining Co.,

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107 Mo. 616; Granby Mining Co. v. Richards, 95 Mo. 106; Catholic Church v. Tobbein, 82 Mo. 418; Finch v. Ullman, 105 Mo. 255; Keith and Perry Coal Co. v. Bingham, 97 Mo. 196; Kinealy v. Railroad, 69 Mo. 658. (3) Even if the transaction between the bank and Mr. Ramsey was invalid, still this action can not be maintained. Lindell v. McNair, 4 Mo. 380; Brandon v. Carter, 119 Mo. 572; Landes v. Perkins, 12 Mo. 238.

BOND, J.—In May, 1897, Joseph Ramsey, Jr., gave his note to the Commercial Bank for $2,400, which sum was placed to his credit, and thereupon the president of said bank indorsed the note of said Ramsey for that sum to one West in payment of 10 shares of the capital stock of said bank, a certificate for which was delivered to Ramsey, and by him re-transferred to said bank as collateral security for the amount evidenced by his note to it. On the twenty-second of November following alias execution on a judgment against said Ramsey was levied upon his interest in said shares of stock, "subject to any claim of the Commercial Bank of St. Louis, thereto," said bank having notified the sheriff that it held an "incumbrance" upon said stock to the extent of $3,100 principal and accrued interest of indebtedness due to it from said Joseph Ramsey, Jr., and the president of said bank having further notified the officer that the indebtedness in question was made up of two sums, to wit, $600 and $2,400 with interest, and that the shares were held by the bank in pledge for the payment of said sums. The sheriff proceeded to sell under his execution the interest of said Joseph Ramsey, Jr. in the shares of stock in question. Plaintiff was the purchaser at that sale for the sum of fifty dollars, whereupon the sheriff executed to him a bill of sale, and plaintiff after demanding the surrender of said shares of stock by the bank, and being refused brought the present action as for a conversion, laying his damages at $2,500. The circuit court ruled that plaintiff

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could not recover, whereupon he took a nonsuit with leave to move to set same aside which motion being overruled, he perfected his appeal to this court.

The learned counsel for appellant insists that the rule of law forbidding a private corporation (except in special cases) to purchase its own stock applies to and taints with illegality the transaction by which Ramsey pledged his shares of stock in the defendant bank as security for the money advanced to him for the purchase of such shares, and that therefore the pledge from Ramsey to the bank being invalid the title to the stock was unaffected thereby and passed to appellant under the sheriff's sale. We think the learned counsel misconceives the legal character of the transaction between the bank and Ramsey. By the contract between these parties the bank advanced Ramsey enough money to enable him to become the owner of 10 shares of its capital stock, and as a security for such advancement took his note for the sum advanced, with a delivery of the stock as security for the payment of the note. This was not a purchase by the bank of its own stock. It was at most the taking of that stock as a pledge for money loaned the purchaser. Such a transaction would not under the general law make the bank the owner of the stock, nor empower it to deal therewith as owner. Neither (in the absence of an agreement with the pledgor) could the bank become the owner even if the pledge had to be sold on account of nonpayment of the note it was given to secure. Greer v. Bank, 128 Mo. 559. Hence it is clear that the transaction in question was not a purchase, direct or indirect, on the part of the bank of its own stock, and that it does not fall either within the letter or the reason of the rule depriving such corporations of the right, in general, to buy their own capital stock. To refuse a private banking corporation the right to accept a pledge of its own stock as a security for past or present indebtedness, would unreasonably restrict its business of lending money, by depriving it of the right to receive therefor col-

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lateral—in the case of stock in many banks—of the highest commercial character and value. Such a restriction would be equally detrimental to the holder of these securities if he desired to use them for the purpose of securing loans from the very bank, which, of all others, should be best informed as to their intrinsic value. It is not the policy of the law to hamper commerce, nor to arrest the free interchange of its greatest utility—money. The judgment of the lower court is manifestly right, and will be affirmed. All concur.

A. G. TONNIES, Administrator, etc., Defendant in Error, v. SARAH McINTYRE, Administratrix, etc., Plaintiff in Error.

St. Louis Court of Appeals, December 28, 1899.

1. **Administration:** JUDGMENTS IN FAVOR OF DECEASED: FINAL SETTLEMENTS: DISCHARGE. The filing of a final settlement and order of distribution without being discharged as administrator by the court, does not amount to a severance of the administrator's title to unadministered assets, and as to such assets he remains the only representative of the estate, recognized by law, and the law devolves upon him the duty of taking the necessary steps to collect such assets, and judgments in favor of his intestate should have allowed against the estate of the judgment debtor.

2. ———: ———: ALLOWANCE OF JUDGMENTS. A. G. Tonnies, administrator *de bonis non* of the estate of Christian Tonnies, proceeded properly in having the three judgments allowed and classified against the estate of McIntyre, the judgment debtor, he being the only party that could act for the estate in that behalf.

3. ———: ———: REVIVAL OF JUDGMENT: UNNECESSARY. Judgments are conclusive as to the several amounts adjudged to be due by them, and it is not necessary for the holder thereof to revive them by *scire facias* within ten years after their rendition, in order that they may be allowed and classified by the probate court against the estate of the judgment debtor.

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Appeal from the St. Louis City Circuit Court.—*Hon. Jacob Klein*, Judge.

AFFIRMED.

Jas. A. Henderson for plaintiff in error.

(1) The court erred in giving judgment in favor of A. G. Tonnies as administrator; the authority of said administrator for the purposes of this action having long since ceased. State v. Rowland, 23 Mo. 95; Garner v. Tucker, 61 Mo. 427; Patterson v. Booth, 103 Mo. 419; Woerner's, sec. 570. (2) The court erred in assigning said claim in the fourth class of demands, when it should have been assigned to the fifth class. Mullen v. Hecorte, 103 Mo. 639; Harness v. Greeno, Adm., 20 Mo. 316; Gainey v. Sexton, 29 Mo. 449.

Herman A. Hampler for defendant in error.

(1) An administrator or executor takes personal assets of estate, and title is in him until the court ordered them distributed to some one else and he discharged. Church v. Branch, 120 Mo. 247; Rugle v. Webster, 55 Mo. 250; Garner v. Tucker, 61 Mo. 432. (2) In case at bar, administration was still in force, in as much as the administrator of Tonnies had never yet been discharged when the notices were given. 55 Mo. 250; Garnèr v. Tucker, 61 Mo. 432. (3) Under section 4, chapter 1, Revised Statutes 1889 the judgments could not have been assigned any other class except the fourth.

BOND, J.—Christian Tonnies recovered three judgments in 1875 and 1876, against J. W. McIntyre, in the circuit court of St. Louis county for the sums of $564.44; $513.87 and $583.14, respectively. Soon afterwards Christian Tonnies died. Administration upon his estate was granted to his widow, and subsequently A. G. Tonnies was appointed administrator

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de bonis non of said estate. On the twenty-sixth of September, 1878, A. G. Tonnies made final settlement of his trust and an order of distribution was entered in accordance therewith. He, however, never filed his receipts showing compliance with said order, and was never formally discharged as administrator *de bonis non*. In 1895 McIntyre, the defendant in said judgments died, and Sarah McIntyre, was appointed administratrix of his estate. Thereupon after notice to her as such, the plaintiff presented transcripts of said judgments to the probate court for classification against the estate of John W. McIntyre. The probate court assigned said judgments to the fourth class of demands. On appeal to the circuit court a similar judgment was rendered, from which the administratrix of J. W. McIntyre has appealed to this court.

A valid final settlement of an administration in the probate court has all the conclusiveness of a former adjudication as to all matters embraced within such settlement, and absolves the personal representatives from further liability on account of anything included in the settlement, except upon appeal, or in the exercise of the equity jurisdiction vested in the circuit court. But that is not the question presented by the present appeal. The question here is, could the administrator of the plaintiff in the judgments, who had never been discharged as such by order of the probate court, present said judgments to that court for classification against the estate of the judgment debtor? The sums due on these judgments had never been collected nor disbursed. The judgments themselves were unadministered assets, to which plaintiff acquired title when he qualified as administrator *de bonis non*. He has never in any way parted with this title, nor has the court which invested him with it, discharged him from future control. He is, therefore, as to these assets still the only representative of the estate recognized by the law, and is necessarily subject to the future orders of the probate court as to their distribution. Rugle v. Webster, 55 Mo. loc. cit. 250; Garner v. Tucker, 61

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Mo. loc. cit. 432; Melton v. Fitch, 125 Mo. loc. cit. 289; 2 Woerner on Administration [2 Ed.], sec. 506. It follows that the objection to the classification of the judgments in question for assumed want of capacity on the part of plaintiff to present them for that purpose, is wholly untenable.

The second point insisted upon by appellant is, that the judgments should not have been classified as such because not revived by *scire facias* within ten years after their rendition. The statute gives this process of revivor to restore the lien of a judgment and authorize a new execution thereon. R. S. 1889, sec. 6013. Although revived in this way a judgment does not lose its character as such, it is still within the statutory period of limitation, conclusive as to the amount adjudged to be due, and as to all defenses which might have been set up prior to its obtention. In this case the title holder of the judgments is not asking process of execution, nor to enforce any judgment liens; he only asks that these judgments—which were mergers of the previous demands upon which they were founded—be assigned to that class which the statute expressly provides for "all judgments rendered against the deceased in his lifetime." R. S. 1889, sec. 183; subdivision 4. The decision of the circuit court so ordering the judgments in question to be assigned to the fourth class of demands against the estate of appellant's intestate is correct, and is therefore affirmed. All concur.

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WILHELMINA STUPPY, Respondent, v. ANNA M. HOF, Appellant.

St. Louis Court of Appeals, January 2, 1900.

Assault and Battery; MEASURE OF DAMAGES: INSTRUCTIONS: ACTUAL DAMAGES. The following instructions, in a case of assault and battery held to properly state the law upon measure of damages: "If you find for the plaintiff, you will allow her such damages as seem to you to be right and proper under all the facts and circumstances. In estimating the damages you have a right to consider the bodily and mental pain, if any, endured by plaintiff resulting directly from defendant's wrongful act" "You may also take into consideration the probable future injury, if any, that you may believe will result to her from defendant's wrongful act" "You may also consider the injuries to her feelings, if any, which you may believe she suffered by reason of any insult or indignity inflicted upon her person by the defendant in connection with the assault complained of. These damages are known as actual damages."

Appeal from the St. Louis City Circuit Court.—*Hon. Selden P. Spencer*, Judge.

AFFIRMED.

J. D. Johnson for appellant.

(1) The trial court improperly instructed the jury as to the measure of damages in the case. Schaub v. Railroad, 106 Mo. 74; Hawes v. Stockyards, 103 Mo. 60; Duke v. Railway, 99 Mo. 347-351; Parsons v. Railway, 94 Mo. 286; Haysler v. Owen, 61 Mo. 270; Haymaker v. Adams, 61 Mo. App. 581; Goss v. Railroad, 50 Mo. App. 614. (2) The trial court also erred in directing the jury to "allow" the plaintiff "such damages as seems" to the jury "to be right and proper under all the facts and circumstances in evidence;"

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because the measure of damages is a question of law, and should not be thus submitted to a jury for their determination as a question of fact. Wilburn v. Railroads, 36 Mo. App. 203; Flynt v. Railroad, 38 Mo. App. 94; McKee v. Railroad, 49 Mo. App. 174. (3) The error in the instruction specified in the last point was not cured by the jury being directed further, that in estimating the damages "you have the right to consider the bodily and mental pain" and "the probable future injury" which plaintiff may have sustained; because the instruction still left it to the jury to consider those matters or not as they saw fit, and to determine the amount of damages as to them might seem proper from other facts and circumstances in evidence other than from the bodily pain, etc.

A. C. & H. B. Davis for respondent.

(1) Instruction No. 2, which is the only one complained of, states the law correctly. In an action for assault and battery, the use of the words, in an instruction for the allowance of damages, that: "You will allow her such damages as seem to you to be right and proper under all the facts and circumstances," properly states the law. Browning v. Railroad, 124 Mo. 55; Boettger v. Iron Co., 124 Mo. 87-105. (2) In an action for assault and battery the liability is not limited to the damages to the person; the jury may take into consideration the mental anguish, insult, indignities and wounded feelings of the plaintiff. West v. Forrest, 22 Mo. 344; Randolph v. Railroad, 18 Mo. App. 609.

BIGGS, J.—The plaintiff sues for damages for an alleged assault and battery. She occupied the lower floor of a tenement house and the defendant lived in the second story. The petition charges that defendant threw a bucket of water

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on the back porch of the second story so that the water ran down upon and injured the plaintiff. It was averred that the act was willfully, wrongfully and unlawfully done. The defendant denied the charge.

There was evidence tending to prove and also to disprove the issue. The plaintiff testified that at the time of the alleged assault the defendant called her a "damned whore," a "country woman," and a "damned sot." The cause was submitted to a jury. There was a verdict for three hundred dollars compensatory damages and one hundred dollars exemplary damages. The defendant appeals and complains of the instructions given for plaintiff on the measure of damages.

After properly instructing as to plaintiff's right of recovery under the evidence, the plaintiff asked and the court gave the following instruction or direction to the jury in determining the amount of damages, if any, to which plaintiff was entitled, to wit:

"2. If you find for the plaintiff under the instructions given, you will allow her such damages as seem to you to be right and proper under all the facts and circumstances."

"In estimating the damages you have a right to consider the bodily and mental pain, if any, endured by plaintiff resulting directly from defendant's wrongful act."

"You may also take into consideration the probable future injury, if any, that you may believe will result to her from defendant's wrongful act."

"You may also consider the injuries to her feelings, if any, which you may believe she suffered by reason of any insult or indignity inflicted upon her person by the defendant in connection with the assault complained of. These damages are known as actual damages."

Unquestionably the first part of the instruction is erroneous, in that it fails to particularize the elements of damage to be considered by the jury in determining their verdict. Wilburn v. Railroad, 36 Mo. App. 203; Flynt v. Railroad,

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38 Mo. App. 94; McKee v. Railroad, 49 Mo. App. 174. My associates are of the opinion that the instruction is not erroneous in its general scope, and under the authority of Browning v. Railway, 124 Mo. 55, and Boettger v. Iron Co., Ibid 87, the judgment ought to be affirmed, especially as the amount of the verdict indicates that defendant did not suffer on account of the generality of the instruction.

In my opinion the instruction is erroneous in its general scope when the facts in evidence are considered. In actions for assault and battery the compensatory damages are determined by fixed legal standards, hence the jury should not be given a "roving commission" to determine the amount by their own conception of right. Under this instruction the jurors were authorized to consider the epithets which plaintiff testified the defendant applied to her, at or about the time of the assault. Proof of the epithets was competent to characterize the assault and thus aid the jury in determining whether exemplary damages ought to be allowed, but not for the purpose of affecting or increasing the compensatory damages. The alleged abusive words can not be treated as a part of the assault, and compensatory damages must come or raise directly out of the assault. One of the elements of damage in such a case is the mental anguish suffered by plaintiff, but this must result from the blow given, or the manner or circumstances under which it was given, and not from the words accompanying the blow, which of themselves may furnish an independent cause of action. Any other view would in my opinion be untenable. The rulings in Daily v. Houston, 58 Mo. 361, and Beck v. Dowell, 111 Mo. 506, are not opposed to this view. In those cases the supreme court held that the "atrocity" of the assault might be shown to enhance the compensatory damages. The application of this rule of evidence to the points there in judgment was correct, but it can not, as may associates contend, be extended so as to authorize proof of epithets in this case to increase the amount

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of the recovery. In the present case if proof had been offered that the water thrown on the plaintiff was filthy, or that the assault was committed in the presence of the plaintiff's neighbors or acquaintances, such testimony would have been competent as tending to show the extent of the mental suffering endured by plaintiff on account of the assault itself, which the jury were authorized to consider in determining the damages sustained. Therefore I conclude that the instruction was essentially erroneous in that it permitted the jury (in determining the amount of compensatory damages), to consider testimony that was entirely irrelevant to the question to which the attention of the jury was directed. But my associates are of a different opinion. Therefore the judgment of the circuit court will be affirmed. It is so ordered. Judge *Bond* concurs in the affirmance only.

WILLIAM C. JOHNSON, Respondent, v. HARRY F. EWALD, Appellant.

St. Louis Court of Appeals, January 2, 1900.

1. **Action, Legal or Equitable**: REPORT OF REFEREE: PRACTICE, TRIAL: PRACTICE, APPELLATE. The findings of fact of the referee in an equitable action are like the special verdict of a jury in a chancery case, that is advisory only, to be received or rejected by the trial or appellate court according to its conceptions of the facts upon a consideration of the entire testimony. On the other hand, if the case is to be tried as one at law, then the findings of the referee as to the facts, must be sustained if supported by substantial evidence.

2. ——: ——: ——: PARTNERSHIP. Under the facts in the case at bar the plaintiff's action must be treated as one in equity for the settlement of partnership business.

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3. ——: ——: ——: ACCOUNTS OF PARTNERSHIP: ACTION: PRACTICE, TRIAL: PLEADING. The rule is that until the accounts of a partnership are settled, and a balance struck, one partner can not maintain an action at law against his co-partner upon a claim growing out of the partnership.

Appeal from the St. Louis City Circuit Court.—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Clinton Rowell, J. H. Zumbalen and *Carl Otto* for appellant.

This being a proceeding for equitable relief, the plaintiff can not recover at all, because he does not come in the tribunal with clean hands. This is a proceeding asking equitable relief. The controversy is between partners, and, primarily one partner can not bring suit at law against his co-partner. The co-partnership relation is only to be considered in a court of equity. There are a few instances where one partner may sue another at law, but this does not come within any of the exceptions. If the partnership business had been entirely wound up and there was a definite agreement as to the amount due, it might be settled in a court of law. McKnight v. McCutchen, 27 Mo. 436; Leabo v. Renshaw, 61 Mo. 292; Bambrick v. Simms, 132 Mo. 48.

Frank Haskins for respondent.

(1) This is an action which could be brought at law, the reference was voluntary by consent of both parties; therefore, the finding of the referee is regarded as a special verdict and can not be disturbed by the court if there is any evidence to support it. Silver v. Railway, 5 Mo. App. 381; Buckner v. Reis, 34 Mo. 357; Howard County v. Baker, 119 Mo. 397; Bambrick v. Simms, 132 Mo. 48; Berthold v. O'Hara, 121

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Mo. 88. (2) Even if it should be construed as an action in equity or for an accounting, if there is evidence to sustain the finding of the referee, and there is no clear showing of mistake, it should not be disturbed. Howard County v. Baker, 119 Mo. 397; Bank v. Big Muddy Iron Co., 97 Mo. 38. (3) Plaintiff was guilty of no fraud which would deprive him of a right of action against defendant. Pomeroy, Eq., sec. 400. (4) The burden of proof was on defendant to show that the division of profits was otherwise than an equal division. Encyclopedia Law [1 Ed.], vol. 17, p. 964. (5) Plaintiff proved by a preponderance of evidence the allegations of his petition.

BIGGS, J.—The plaintiff and defendant entered into an agreement to buy and sell a lot of machinery on joint account. The property was purchased and sold. The parties disagreed as to the division of the profits, and the present action was brought for an accounting. The property was bought for $22,500 which amount the defendant advanced. The agreement between the parties was oral. The plaintiff's understanding of the contract as stated in his petition, and which his evidence tended to prove, was to the effect that the defendant was first to be reimbursed for the purchase money; that he was also to receive the first $5,000 of profits, which the plaintiff guaranteed to him; that if the profits exceeded $5,000 and were less than $10,000, then the plaintiff was to receive the amount in excess of $5,000, and that if the profits should be more than $10,000, then after plaintiff and defendant had received each the sum of $5,000, the balance of profits was to be equally divided between the parties.

The defendant's version of the contract as set forth in his answer was as follows, to wit: "Defendant was to receive back first his original purchase price of $22,500, and thereafter, should the sales equal or be less than $27,500, in the aggregate, defendant was to receive of the money realized

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therefrom $5,000 clear in addition to his purchase price of $22,500, and plaintiff was to stand and pay all losses and expenses of such sales up to the time that the sales should reach $27,500, and should the sales be less than $27,500, in addition to the foregoing losses and expenses, the plaintiff was to make good and pay to defendant any and all deficiency between the purchase price and said $27,500. Secondly, should the sales be over the $27,500 and equal to or under $32,500, then plaintiff was to receive all money realized from said sales over $27,500 and up to or under $32,500, and up to the time that said sales amounted to or were under $32,500, plaintiff was to stand and pay all losses and expenses of such sales, and defendant was to receive the said $27,500. After the sales reached $32,500, as aforesaid, all subsequent sales and profits realized therefrom and all losses and expenses attendant upon said subsequent sales were to be divided equally between plaintiff and defendant."

The cause was referred. The referee found that the property was purchased in the name of defendant for $22,500, which the defendant furnished; that the plaintiff was to advertise and sell the property, the proceeds to be deposited with the defendant; that the total amount of sales, including an item of commissions received by plaintiff and hereinafter referred to, was $38,186.60; that the total expenses and losses amounted to $2,508.85; that defendant received back his purchase money and retained from the profits realized, the sum of $5,000, and that plaintiff has drawn for himself $5,640.38, all of which was done prior to the institution of the suit. These facts are not controverted.

It will be thus seen that the essential point of difference between the parties was, whether it was agreed that the expenses incurred up to the time the sales reached $32,500, should be paid out of plaintiff's share of the profits. Concerning this question of fact the referee reported as follows:

"As to the essential point, the arrangement that ex-

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penses should be paid out of Johnson's share, Ewald's testimony is very emphatic and precise, going into details of the conversation. But Johnson is as emphatic in his denial of that part of the alleged agreement and of the details related by Ewald.

"Both are credible men. The difficulty lies in the slipshod way of making a contract so important to the parties. I am fortunately not called on to explain just how the transaction occurred or may have occurred, but merely to determine whether the evidence establishes an agreement as Mr. Ewald claims. Considering the direct evidence of the parties to that conversation, as contradicting each other and dismissing, as not sufficient to turn the scale, considerations that may be urged as to the probability of such an agreement, I come to the conduct of the parties under the agreement, whatever it was.

"After the purchase, Johnson & Ewald agreed to have a fresh appraisement made by Livingston, then in the employ of Mr. Ball. When Johnson, with his bookkeeper, Gratiot, came to take Livingston up to the plant, Mr. Ball testified that he inquired who was to pay the expenses—with special reference to Livingston's time while making the appraisement, to which either Johnson or Livingston replied that Johnson did. Johnson denies any such utterance, admitting that he may have said that he would stand good for Livingston's compensation.

"Again, Livingston says that after the appraisement of the plant, he was of the party while Johnson and his bookkeeper, Gratiot, were discussing the issuance of descriptive circulars. According to Livingston, Johnson said to Gratiot something to this effect: 'We should get a folder descriptive of the machinery; it mustn't be very expensive, as I have to bear the expense.' Johnson and Gratiot deny this. The third instance cited by the plaintiff, an interview between himself

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and Gratiot, is mentioned hereafter, in presenting the other side of the case.

"This business was carried out in the name of Johnson. Ewald was willing that Johnson should have the credit and advertising involved. Ewald received and paid out all moneys with the exception of petty cash at the plant. Johnson, at Ewald's suggestion, kept a separate book account for this business, which Ewald frequently examined. Gratiot was employed as bookkeeper at the plant. A few days after commencing business, Ewald and Gratiot had a conversation. Ewald testifies that he was led to speak to Gratiot by hearing Johnson make some remark to Gratiot in his (Ewald's) presence which might refer to some interest Gratiot was to have. According to Ewald, he (Ewald) explained the division of proceeds to Gratiot just as he had to Johnson, including the element of payment of expenses out of Johnson's profits. Gratiot emphatically denies that expenses were alluded to, but says Ewald stated the arrangement to be just what Johnson now claims.

"Ewald's own testimony throws further light on this conversation. Shortly thereafter Johnson humorously related to Ewald Gratiot's horror at the idea that Ewald was to have $5,000 profit before Johnson got anything. Even according to Ewald, nothing was said in this conversation with Johnson in reference to charging Johnson's profits with the expenses. Though Johnson and Ewald met in this business frequently, nothing appears to have been said as to distribution of profits between Ewald, Johnson or Gratiot, till about Christmas time, as hereinafter mentioned.

"In the meantime Johnson appears to have consulted Ewald, whenever any expense beyond routine was incurred. Stress, I think, should be laid on the way expenses were booked by Gratiot with Johnson's knowledge and consent, if not by his direction. If Johnson understood expenses came out of his profits, it would have been to his interest to

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book all outlays, where there was a plausible excuse, under some other heading than expense. In this litigation, Johnson is claiming that 'expense' in the ledger contains about a dozen items aggregating several hundred dollars, which were not properly chargeable to that account."

Then follows a statement of several items of expense referred to, which need not be set forth here. The referee concluded his report as follows:

"I am satisfied beyond reasonable doubt that Johnson at no time prior to about Christmas, 1897, imagined that expenses came out of his profits. About Christmas, 1897, Ewald asked Gratiot at one of his visits to Ewald's office on business of this plant, whether the sales amounted as yet to $32,500. Gratiot's counter-query as to what importance attached to that figure, opened up the question of division of profits; and Ewald stated his view of the arrangement as he does in this case. Gratiot was evidently much astonished; and when he next had occasion to call on Ewald, a day or two later, had the claims re-stated to him.

"Gratiot doubtless told Johnson. After that time, as Ewald tells us, Gratiot was always present when the division was discussed, implying as doubtless was the case, that Johnson wanted a witness.

"As against this whole course of conduct, the admissions of liability for costs by Johnson in the two instances above cited are of little weight, even if we accept the utterances as given by defendant's witness. Each remark was made while referring to one special item of expense. The remarks, even if correctly given, amount to little when unsupported by other facts and contradicted by plaintiff's conduct.

"I think the preponderance of the evidence shows that Johnson did not agree with Ewald that the former should bear alone expenses until the gross sales reached $32,500. In this view of the facts, all questions as to burden of proof, or as to indulgence of technical presumption are eliminated.

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"I submit that I find the contract between the parties of this suit, as to division of proceeds, to have been as follows: First to pay the expenses and to Ewald the purchase price, $22,500; next to Ewald $5,000; next to Johnson $5,000; any excess to be divided equally, and further specifically find, that it was not agreed that the expenses should be paid out of Johnson's share of the profits."

It was disclosed at the hearing before the referee that in the purchase of the machinery the plaintiff acted as the agent of the vendor and received a commission of $350 for his services. By consent the defendant amended his answer, claiming that in the statement of the account the commissions received by plaintiff should be treated as profits of the business, which was so allowed by the referee. The referee found the net profits to be $13,187.75; that plaintiff had received $5,640.38, leaving a balance due him from defendant of $953.49.

The defendant filed exceptions to the report of the referee, which the circuit court overruled. The report was approved, and a judgment entered in conformity with it. The defendant has appealed.

There is a question at the threshold of the case which we must first determine, that is the nature of the action, whether legal or equitable. If the latter, then the findings of the referee as to the facts are like the special verdict of a jury in a chancery case, that is advisory only, to be received or rejected by the trial or appellate court according to its conceptions of the facts upon a consideration of the entire testimony. Pendergast v. Eyermann, 16 Mo. App. 387; State ex rel. v. B. & L. Ass'n, 78 Mo. App. 104. On the other hand, if the case is to be treated as one at law, then the findings of the referee as to the facts, must be sustained if supported by substantial evidence.

The rule is that until the accounts of a partnership are settled, and a balance struck, one partner can not maintain

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an action at law against his co-partner upon a claim growing out of the partnership. Some authorities hold that there must also be an express promise on the part of the debtor partner to pay the balance. The weight of authority, however, is against this. The books state some exceptions to the rule. Where there is but a single item to liquidate, the partnership being at an end, an action at law may be maintained by one partner against another. Buckner v. Ries, 34 Mo. 357. In the case cited Buckner was about to sell a hogshead of tobacco at auction. It was agreed between him and Ries that if the sale exceeded a certain sum Buckner would divide the excess with Ries, and that if the sale was less than the sum mentioned, Ries agreed to pay Buckner one-half of the deficit. The tobacco sold for less than the amount agreed on, and Buckner sued Ries at law to recover one-half of the deficit. The supreme court held that the action was properly brought. The chief reason why common law jurisdiction is ordinarily inadequate to a proper adjustment of a specific claim of one partner against another and growing out of the partnership is, that all charges and credits connected with the partnership business must be taken into consideration before it can be ascertained that one partner is justly indebted to his copartner. In an ordinary business co-partnership this would present a multitude of issues which could not be properly tried and settled by a jury. Therefore in very early times courts of equity assumed jurisdiction in all matters of accounting between partners, unless the partners had agreed upon a settlement. In the Buckner case, *supra,* the complications or difficulties mentioned could not arise. There was but a single transaction, to wit, the sale of one hogshead of tobacco, and the amount due plaintiff on account of it was unquestioned. The doctrine of this case was invoked in Bambrick v. Simms, 132 Mo. 48. In that case the partnership was with respect to but one enterprise, to wit, the construction of six sections of a railroad, but as many business transactions grew out of the

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work, the supreme court held that an adjustment of the partnership business could only be had in a court of equity. So in the present case the sale of the property (which was of large value) was by piecemeal, involving many separate transactions, and in which various items of expense were incurred. Therefore we think that plaintiff's action must be treated as one in equity for the settlement of the partnership business.

To obviate a statement and discussion by us of the evidence bearing on the terms of the copartnership, we have set forth herein that portion of the report of the referee on the subject, as we consider it a fair and full statement of the evidence adduced before him. While the evidence is conflicting and close as to the matters in issue, our examination has failed to convince us that the referee erred in his conclusions. It can not be said that his findings were the result of mistake (Mfg. Co. v. Iron Co., 97 Mo. 38), but on the contrary his report shows that he carefully considered and weighed the entire testimony, and his conclusions are satisfactory to us.

It was developed at the hearing before the referee that prior to the agreement between respondent and appellant, the owner of the machinery employed the former to sell it, and agreed to pay and did pay him a commission on the sale. He failed to disclose the fact of his agency to appellant. Counsel for appellant earnestly argue that by reason of this deception practiced by respondent the door of the court must be closed against him, invoking the equity rule that "he who comes into equity must come with clean hands." We think that counsel urge an erroneous application of the principle. The doctrine is commonly applied in actions for specific performance. If it appears in such a case that the complainant in obtaining the contract acted in bad faith or inequitably, the relief will be denied. Again, the principle will govern where a contract has been entered into to accomplish a fraudulent purpose. If such a contract is executory,

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a court of equity will not enforce it. Neither will it decree its cancellation if executed. The rule is also applied to illegal contracts or transactions, where in contemplation of law both parties are *in pari delicto*. The limitation of the rule is thus stated by Mr. Pomeroy (1 Pom. Eq. Jur., sec. 399), to wit: "Broad as the principle is in its operation, it must still be taken with reasonable limitations; it does not apply to every unconscientious act or inequitable conduct on the part of a plaintiff. The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern. When a court of equity is appealed to for relief it will not go outside of the subject-matter of the controversy, and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant, or the relief which he demands." This statement of the law in our opinion puts the case here within the limitations of the rule, for the alleged inequitable conduct of respondent in no manner affects the equitable rights which he asserts against the appellant. The agency of the respondent for the sale of the property antedated his agreement with appellant, and the one had no connection whatever with the other. Neither was it shown that the property could have been bought for less money than was paid for it. Hence it can not be said that the alleged contract of agency was directly connected with or in any manner affected the matter in litigation, to wit, a division of the profits of the venture. Besides the appellant claimed in his answer one-half of the commissions received by respondent, and in the statement of

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the account the referee acceded to his demand. This action on the part of appellant might well be held to be a waiver of all objections to the alleged misconduct of the respondent.

With the concurrence of the other judges, the judgment of the circuit court will be affirmed. It is so ordered.

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HERBERT A. WAGNER, Respondent, v. THE EDISON ELECTRIC ILLUMINATING COMPANY OF CARONDELET, Appellant.

St. Louis Court of Appeals, January 2, 1900.

1. **Contract, Construction of**; SPECIFIED SERVICES: CONSIDERATION: APPORTIONABLE CONTRACT: COMPENSATION. A deep rooted principle of common law is that when parties have entered into a contract by which the amount to be performed by one and the consideration to be paid by the other are made certain and fixed, the contract can not be apportioned. But where the services to be performed are specified and fixed, but the consideration to be paid is left to be implied by law, the contract may be apportionable, provided the nature of the contract is such that the accrual of the benefits go along and keep pace with the performance and are not dependent upon a completion of the contract in its entirety.

2. ———: ———: ———. Where benefits accrue as they did in this case as the work progresses, it may be well presumed that the parties contemplated remuneration should be paid from time to time during the progress of construction; especially may this presumption be indulged in view of the fact that the contract provided for monthly payments to the contractor on estimates to be made by respondent.

3. **Construction of Contract**: PRESUMPTION. In the case at bar, it is held that the contract is apportionable, and that the suit is not prematurely brought.

4. ———: INSTRUCTION. Instruction in the case at bar examined and held to properly submit the sole question of fact to the jury.

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5. **Practice, Appellate**: ERRONEOUS INSTRUCTIONS. Where, on the whole record the judgment is for the right party it should be affirmed notwithstanding the giving of erroneous instructions, which in the opinion of the appellate court did not materially affect the merits or prejudice the appellant.

Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

REVERSED AND REMANDED, AND CAUSE CERTIFIED TO SUPREME COURT.

O'Neil Ryan for appellant.

(1) Respondent's contention that a judgment in this action will bar another action begs the question, which is: The contract (if one existed) being entire, and not ended, can plaintiff maintain an action thereon? In other words, if he has a cause of action it has, I submit, been brought prematurely. It has been often held that where a suit is brought on a cause of action before the same has accrued, the proceeding must be dismissed. Heard v. Ritchey, 112 Mo. 519; Mason v. Barnard et al., 36 Mo. 384-391; Brown v. Shock, 27 Mo. App. 351; Vandike v. Maddix, 23 Mo. App. 192. (2) The rule as to what constitutes an entire contract, and that an action on such a contract before it is completed is premature, is also sustained by the authorities cited under point two of appellant's main brief.

Morton Jourdan for respondent.

(1) In addition to authorities cited under this head in former brief, I call court's attention especially to Kerr v. Cusenbary, 60 Mo. App. 563, in which it is said, "But it is also well settled that whenever service is rendered and received, a contract of hiring or an obligation to pay will be presumed." * * * "Nor is it necessary in all cases for

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the plaintiff to prove an express assent of the defendant to enable the jury to find a previous request; they may infer it from his knowledge of the plaintiff's acts or his silent acquiescence." (And cases cited). * * * Again same case: "And whether the services rendered were intended as a gratuity is a question of fact to be left to the jury." Under the rule, Linnekohl v. Winkelmeyer, 54 Mo. App. 573 and Hernan v. Co., 58 Mo. App. 485, respondent is entitled to recover, and this rule defeats suggestions "premature." Glover v. Henderson, 120 Mo. 376 and Yeates v. Ballentine, 56 Mo. 536.

BLAND, P. J.—In 1896 the municipal assembly of the city of St. Louis, passed ordinance number 18680 (known as the "Keyes" ordinance), which required electric and power companies doing business within the district bounded by the river and Twenty-second street, Wash and Spruce streets, to bury their wires under ground, and forbidding the use of poles, etc., above ground within the designated territory after December 31, 1898. The ordinance provided certain privileges to persons and corporations complying with its terms. The defendant, the Phoenix Light, Heat and Power Company; the Missouri Electric Light & Power Company, and the St. Louis Electric Light and Power Company qualified under the ordinance, and presented to the board of public improvements of the city their several plans for construction of underground conduits. These plans were located in many instances on the same streets and alleys in the district, for which reason the several companies were compelled to construct jointly, by order of the board of public improvements in the exercise of a power delegated to it by the ordinance. The above mentioned companies on April 17, 1897, entered into a single but several contract with the National Conduit Construction Company of St. Louis, and two other construction companies for the underground conduits to be used by them jointly. This

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contract provided for a construction committee of four members, one to be selected from each of the four companies, to which all disputes between the said companies and the construction companies should be referred for final decision. No engineer was named in this contract for these several companies, yet the contract in numerous places refers to one, and certain powers are given him with respect to supervision and approval of the work, showing that the appointment of such an engineer was contemplated by all the parties to the contract. The conduits are roughly described in the evidence as similar to a large gun barrel with numerous circular spaces extending its entire length with the ducts of each company, varying in number according to its needs, but made inseparable from the ducts of the other companies, so that the ducts of one could not be removed without removing all; so that the surveys, plans, supervision, permits and all that appertained to the construction of the conduits was both the joint and individual undertaking of the four companies. The committee provided for in the contract was made up of E. V. Matlack, representing the defendant, A. Ross, representing the Phoenix Company, D. W. Guernsey, representing the St. Louis Company, and plaintiff, representing the Missouri Company. On April 30, 1897, the committee organized by electing Wagner chairman, and Ross secretary, and adopted rules for the conduct of its proceedings, among which was one providing that no motion could be carried unless it received three votes in the affirmative. On May 7, 1897, Mr. Ross moved that Wagner be appointed engineer to supervise the underground work as provided for in the contract of April 17, 1897. The motion was seconded by Guernsey. On vote being taken, all voted aye, except Mr. Matlack who voted no, and Wagner was declared duly appointed engineer. Mr. Wagner appointed the other gentlemen of the committee, a committee of three to outline and define the duties of the engineer. A majority and minority report was made; the

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majority report was adopted by the full committee, Matlack voting in the negative. Briefly stated, the majority report as adopted required the engineer to provide all plans for construction; to secure permits therefor from the board of public improvements, and to have general supervision over the work provided for in the contract of April 17, 1897. The committee in behalf of the several companies in interest then gave to the board of public improvements the following notice:

"St. Louis, Mo., May 11, 1897.

To the Hon. Board of Public Improvements of the city of St. Louis, Gentlemen:

The undersigned companies have appointed Mr. Herbert A. Wagner engineer for the construction of their conduits, under authority of ordinance No. 18680. You will please deliver permits for conduits to him or his order.

"Very respectfully,
"Missouri Electric Light & Power Co.
"Edison Illuminating Co. of St. Louis,
"The Electric Light, Power & Conduit Co.,
"S. B. Pike, Secretary.

"The Phoenix Light, Heat & Power Co.,
"A. Ross, President.
"The Edison Illuminating Co. of Carondelet,
"E. V. Matlack, Secretary.
"St. Louis Electric Light & Power Co.,
D. W. Guernsey, President."

Each block of street where it was planned to construct the conduit was obstructed by underground gas and water pipes, and in some instances by sewers; these it was necessary to go over or under without disturbing them, hence great care was required and a study of the city records as to location of these obstructions and the preparation of maps and drawings showing their location, depth, etc., was necessary. All this was done under the supervision of Wagner, and a special

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preliminary plan of each block was made and furnished to each company. From these preliminary plans final plans were prepared by Wagner acceptable to all the companies, and then submitted to the board of public improvements for the purpose of getting permits for the construction of the conduit. Of this work about twenty plans were prepared for each block; to prepare them required the work of four or five draughtsmen for a year; all the measurements were taken by Wagner, or by an engineer acting under him, and a record made of them; monthly estimates of the work was made by or under his (Wagner's) supervision, and submitted to the construction committee, on which monthly payments to the contractor were made; a large number of inspectors were employed to watch the contractor; these reported to Wagner and were assigned to duty by him, and all orders to the contractor came from Wagner. An office force of clerks, draughtsmen and inspectors, and a force of under-engineers were furnished by the respective companies, but all acted as a unit and worked under the order and control of Wagner as engineer in chief. The labor was not only great, but also, as to the work of the engineer, it had to be skillfull and exact to meet the requirements of the ordinance and to leave undisturbed the existing underground obstructions. The responsibility for plans, measurements and successful construction, were all on Wagner as engineer in chief, and he supervised and directed all. The work of construction as it progressed was on the estimate and certificate of Wagner, when approved by the construction committee, paid by the respective companies *pro rata* as follows: Missouri Company seven-twelfths; Phoenix, two-twelfths; defendant, three-twelfths A short time after the formation of the construction committee, the St. Louis Company was absorbed by the Missouri Company, but Mr. Guernsey continued on the committee and acted thereon in the interest of the Missouri Company. At the time the construction committee was formed Wagner

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was general superintendent and engineer of the Missouri Company and the Edison of St. Louis, receiving per month $250, and $200, respectively for his services, which salaries he continued to receive during joint construction of the underground conduit. He made no special charges against these companies for extra services as engineer in chief of joint construction. Wagner represented on the construction committee the Missouri Company, the Edison of St. Louis, and the Electric Light, Power and Conduit Company; the three latter companies were absorbed by the Missouri Company. Ross and Guernsey testified that Wagner was chosen as chief engineer for the reason that they thought he would not charge as much for his services as an engineer who had no connection with any of the companies, and that on several occasions at committee meetings Wagner stated he expected pay for his services as chief engineer of the work, and that they always understood he was to be paid. Matlack on the contrary says, that nothing was ever said about paying Wagner, until in the summer of 1897, when the Imperial Electric Company wanted to come in, the question was then discussed in reference to its just proportion of the expenses, should it be let in, but that prior to that time the committee had never agreed upon any sum to be paid to Wagner for engineering work, and that the matter had never been discussed or reported to the companies, and that at this same meeting he expressly stated that his company would not pay for such work, but would provide for its due proportion of the engineering work, and whenever the matter came up afterwards, he invariably said to Wagner, "we don't owe you anything and won't pay you anything," to which Wagner would reply, "I'll make you pay." The Phoenix Company paid Wagner $100 per month for ten months services as chief engineer of joint construction, without objection. On February 18, 1898, Wagner made a written request on appellant for payment for his services at the rate of $100 per month. The

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appellant refused to pay the bill. The construction continued and Wagner continued to act as chief engineer. Some time in the latter part of May, 1898, he placed his claim in the hands of Mr. Jourdan, his attorney, for collection. On June 4, 1898, in answer to a letter addressed to him by Mr. Jourdan, in regard to the account, Mr. Ryan, attorney for the defendant, stated, to use his own language: "The defendant does not consider itself liable to Mr. Wagner for any duties he had theretofore or might thereafter discharge as engineer of conduit construction." Wagner on the trial testified that he had rendered services as engineer on joint construction in November, 1898, and that he still considered himself in defendant's employ as engineer of joint construction, and that his total claim for services as such engineer rendered appellant, prior and subsequent to the beginning of the suit, was $1,700. It was admitted on the oral argument that $100 per month for plaintiff's services was a reasonable charge against defendant, if defendant is legally bound to pay for such services. The suit was commenced on June 6, 1898. The petition is as follows:

"That on May 7, 1897, plaintiff was employed by defendant to render service to it as engineer in charge of and to supervise work in and the construction of its conduit system, and promised to pay the reasonable value of the service; that he rendered the services from May 7, 1897 to May 7, 1898; that they were reasonably worth twelve hundred dollars; that payment has been refused, and prays judgment."

The answer was a general denial. The jury returned a verdict in favor of plaintiff for $1,200. A motion for new trial proving of no avail, defendant appealed.

The court gave on behalf of respondent the following instructions, to all of which appellant objected and excepted.

"1. If the jury find that defendant through its secretary Mr. Matlack, requested the plaintiff to perform the services

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in issue, and that plaintiff performed said services, then the verdict will be for plaintiff."

"2. If the defendant's officers saw and knew that plaintiff was rendering the services in issue and that plaintiff expected pay therefor, then the verdict will be for plaintiff."

"3. Even though you find no employment or request to perform said service by defendant, yet if plaintiff rendered said services and the defendant accepted the results of his labor, then the verdict should be for the plaintiff."

"4. The defendant is a corporation and hence can act only through its duly elected and acting officers, hence any act of Mr. Matlack, the secretary, or Mr. Scott, the president, with reference to the employment of plaintiff, if you find there was such employment;

"Or, with reference to permitting plaintiff to do the work expecting payment therefor;

"Or, the acceptance of the results of the labor of plaintiff, if labor you find he performed, was the act of and bound the defendant."

Appellant, at the close of plaintiff's case, demurred to the evidence, which was overruled; to this ruling it duly objected and excepted at the time. There are a number of exceptions to the admission and rejection of testimony saved by appellant during the progress of the trial. An examination of these fails to disclose any material error in the rulings of the court on questions of evidence, and we will pass them over without further notice.

The clause of the contract providing for the construction committee reads as follows: "To prevent all disputes, it is agreed by and between the parties to this contract, that a construction committee composed of representatives, one to be selected by each of the companies, shall decide all questions which may arise relative to the execution of the contract on the part of the contractors, and its decisions shall be final and conclusive." All through the contract the en-

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gineer of the contracting companies is mentioned; it is provided that the work of construction shall be done under his supervision, and must be accepted by him; he is authorized to supervise construction; to inspect and test material to be used in construction; he is required to locate and designate manholes, and all disputes between the contractor and the engineer are referred to the construction committee for final decision. In short, the supervision and execution of the contract on their part is delegated by the contracting companies to the committee and the engineer. The personal of the engineer is not named in the contract, nor did the contracting companies after its execution at any time undertake to appoint one, but acquiesced in the appointment of Wagner by the committee. It may, therefore, be said, that even if the power to appoint an engineer was not expressly or impliedly conferred on the committee, yet its appointment of him was ratified and approved by all the companies, as shown by the notice of his appointment served on the board of public improvements May 11, 1897. The construction committee was the agent of all the companies—not each member thereof the agent of the company selecting him as a committeeman—and the powers given the committee under the contract were such as to authorize the appointment of an engineer, or to do anything that might be done by the contracting parties acting jointly, neccessary to be done to secure the construction of the conduit according to the terms and requirements of the contract. Wagner's employment therefore by the defendant is not an open question, in view of all the evidence in the record. It is admitted that his services to the defendant were worth $100 per month, but the contention of appellant is that he should not be paid for his services, because, first, it was not expressly agreed when he was employed that he should receive compensation, and second, because all the companies furnished other engineers, inspectors, clerks and messengers from their general force of

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employees; for those services no extra charges were made or compensations claimed; and third, because Wagner at the time he was performing services for all the companies was receiving salaries as the superintendent and engineer of two of the companies, against whom he made no extra charges for his special work as chief engineer of construction. The evidence of Wagner's intention to charge for his service when appointed, is somewhat conflicting, but this question was squarely submitted to the jury by the third instruction given on the part of appellant, and the jury found against the appellant on this issue of fact. There is evidence tending to support that finding, hence the question is not open for discussion by us on appeal. That Wagner was receiving salary from other companies, against which he made no extra charge, is no reason why appellant should receive the benefits of his skill and labor for nothing; nor does the fact that employees of the several companies performed services under Wagner as chief engineer, for which no extra charges were made, stand in the way of Wagner's recovery for his services. That he was employed; that he earned what he had sued for, and that the appellant justly owes him,it seems to us in view of all the evidence and the verdict rendered by the jury, are questions about which there is no longer reason for controversy. Some of the instructions given are not hypothecated on the evidence, and required the jury to find some facts not necessary to be found to entitle respondent to recover, and were therefore erroneous, but not prejudicial to appellant. The material question in the case, was the right and purpose of Wagner to charge for his services. This was properly submitted by instructions given for appellant and we find no reversible error in the giving of instructions.

Appellant contends that the suit was prematurely brought. Wagner was employed by the committee for joint construction; his employment necessarily covered the entire construction, which was not completed until some time after

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the suit was brought; his services were therefore not at an end when he commenced his suit, unless the letter of appellant's attorney of June 4 terminated his employment in so far as the appellant was a party thereto. The peculiar relation of these several companies to each other makes this question a difficult one. They were not partners, but joint contractors, with a several but not joint liability for expense and charges for the construction of the conduit under the joint contract. Appellant could not withdraw from the joint undertaking, nor revoke the agency (the construction committee), which it had agreed to create, and had helped to raise. It might have withdrawn its appointee on this committee and persuaded the other companies to do the same thing and make new appointments, but it could not destroy the committee, nor revoke any of its delegated powers, nor could it repudiate its actions, when within the scope of its authority. It might have persuaded the committee to discharge Wagner, but it could not force it to do so nor could it discharge him from the employment he had received from the committee, nor under the circumstances refuse to accept the benefit of his services. The position of appellant was somewhat anomalous, but it put itself in that position by its own contract, and we hold that the letter of June 4 did not discharge Wagner, and that he continued the servant and employee of appellant until the completion of the work of construction. The time for which Wagner was employed was not designated in the motion appointing him, but the circumstances of the appointment, the understanding of the members of the committee, and his own understanding was that it was for the whole period of construction. There was no agreement to pay in instalments, or to pay at any particular time, or to pay a stipulated sum. The contract being for the entire construction, and no agreement as to time or amount of payment, was anything due when the suit was brought? In other words, is the contract apportionable? If not, then

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the suit was prematurely brought. Hill v. Mining Company, 119 Mo. 9; Bersch v. Sander, 37 Mo. 104; Atkins Grocery Company v. Tagart, 60 Mo. App. 389. A deep-rooted principle of the common law is that where parties have entered into a contract by which the amount to be performed by one and the consideration to be paid by the other are made certain and fixed, the contract can not be apportioned. But where the services to be performed are specified and fixed, but the consideration to be paid is left to be implied by law, the contract may be apportionable, provided the nature of the contract is such that the accrual of the benefits go along and keep pace with performance and are not dependent upon a completion of the contract in its entirety. Note to Cutter v. Powell, 2 Smith's Leading Cas. 1228; Sickels v. Pattison, 14 Wend. 257; Wade v. Haycock, 25 Penn. St. 382. Where benefits accrue, as they did in this case, as the work progressed it may be well presumed that the parties contemplated remuneration should be paid from time to time during the progress of construction, especially may we indulge this presumption here in view of the fact that the contract provided for monthly payments to the contractor on estimates to be made by Wagner and approved by the committee. Indulging this presumption we hold that the contract is apportionable, and that the suit was not prematurely brought.

Should the judgment be reversed on account of the error in instructions given for respondent? In view of all the evidence we think not. The sole question of fact about which there was any controversy at the trial, was whether or not Wagner intended to charge for his services, when he was appointed chief engineer of construction by the committee. As hereinbefore stated, that issue of fact was properly submitted to the jury by appellant's third instruction, which reads as follows: "The court instructs the jury that if they believe from all the facts and circumstances in evidence that the plaintiff when he was appointed by the construction com-

mittee engineer for joint construction, did not intend to charge for his services, that he could not thereafter change his mind and charge therefor, even though you believe that the services were beneficial to defendant." None of the instructions given for the respondent contradict or are opposed to this instruction. The jury was therefore bound to find that Wagner intended to charge appellant for his services at the very time of his appointment, before they were authorized under the evidence and instructions of the court, to return a verdict in his favor. The evidence on all the other issues of fact to entitle him to recover was practically all on the side of Wagner, and there is no controversy as to them. On this showing from the whole record it is our duty to affirm the judgment, notwithstanding the giving of erroneous instructions, which in our opinion did not materially affect the merits or prejudice the appellant. Rev. Stat. 1889, sec. 2303; Jones v. Poundstone, 102 Mo. 240; Homuth v. Street Ry., 129 Mo. 629; Sullivan v. Railroad, 133 Mo. 1; Whitehead v. Atchison, 136 Mo. 485; Scotland County v. O'Connel, 23 Mo. App. 165; Newberger v. Friede, 23 Mo. App. 631; Noble v. Blount, 77 Mo. 235; Browne v. Ins. Co., 68 Mo. 133; Rowell v. St. Louis, 50 Mo. 92; Barr v. Armstrong, 56 Mo. 577; Nelson v. Foster, 66 Mo. 381; Greene v. Railroad, 60 Mo. 405. The judgment, with the concurrence of Judge *Bond*, is affirmed. Judge *Biggs* dissents, and is of the opinion that the second instruction given for the respondent is in conflict with Kinner v. Tschirpe, 54 Mo. App. 575, and that the third one is in conflict with the following cases: Allen v. College, 41 Mo. 302; Whaley v. Peak, 49 Mo. 80; Painter v. Ritchey, 43 Mo. App. 111; Carter v. Phillips, 49 Mo. App. 319; Hiemenz v. Goerger, 51 Mo. App. 586, and Hartmett v. Christopher, 61 Mo. App. 64, and that the error was prejudicial to the appellant, and that the judgment should be reversed and the cause remanded, and requests that the cause be certified to the supreme court for final determination. It is so ordered.

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W. C. LINDSAY, Appellant, v. CONTINENTAL NATIONAL BANK OF ST. LOUIS, Garnishee of TUDOR F. BROOKS, Respondent.

St. Louis Court of Appeals, January 2, 1900.

1. **Deposit in Bank**: TRUST FUND: NOTICE TO BANK. The deposit of money in a bank under the name of Tudor F. Brooks, agent, together with the fact that at and before the time said deposit was opened, the said Tudor F. Brooks notified the officers of the defendant bank, that the money deposited in that account would be funds belonging to persons other than himself, and in which he would have no personal interest, together with the form in which the account was opened, would be notice to the bank of the fact that said fund was a trust fund.

2. ——: ——: ——: BURDEN OF PROOF. And this state of facts threw the burden upon the plaintiff in the case at bar, of showing that the funds on hand at the time of the garnishment was the property of Tudor F. Brooks.

Appeal from the St. Louis City Circuit Court.—*Hon. Pembrook R. Flitcraft,* Judge.

AFFIRMED.

W. C. & J. C. Jones for appellant.

(1) The garnishee having treated the deposit as belonging to Brooks (and having paid it to him since the garnishment), can not set up an outstanding right in third persons who are not parties to this proceeding or claimants of the fund. This may be done by the attaching creditor of the true owner, or by the true owner himself, but not by the garnishee in the absence of any notice of claim and assertion of right by such true owner. Citizens Bank v. Alexander, 120 Pa. St. 476, 484; Bank v. Mason, 95 Pa. St. 113, follow-

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ing and affirming Jackson v. Bank, 10 Pa. St. 62, which was also followed and affirmed in McAllister v. Commonwealth, 30 Pa. St. 536; Patterson v. Bank, 130 Pa. St. 431; Bates v. Stanton, 1 Duer. 85. (2) The fund was *prima facie* the money of Brooks. When the garnishment was served the bank should have retained the fund and answered, setting up the claim of third parties, if any, and calling on them to assert their claim. Having failed to do this, the fund is conclusively presumed to be the money of Brooks. Gregg v. Bank, 80 Mo. 251; Proctor v. Greene, 14 R. I. 42; Boatman's Bank v. Overall, 16 Mo. App. 513; s. c., 90 Mo. 510; Wimer v. Pritchett, 16 Mo. 252; Jackson v. Bank, 10 Pa. St. 62; McAllister v. Commonwealth, 30 Pa. St. 536; Drake on Attachment, sec. 491; 3 Am. and Eng. Ency. of Law [new Ed.], page 831; Egbert v. Payne, 99 Pa. St. 239, 244; Swarbout v. Bank, 5 Denio, 555.

Seneca N. Taylor and *Charles Erd* for garnishee.

(1) Money deposited in a bank payable to the order of B, agent, raises the *prima facie* presumption that the money does not belong to B personally, but that he holds it for some party or principal. Gregg v. Bank, 80 Mo. 256; Jones v. Bank, 42 Pa. St. 533; s. c., 44 Pa. St. 253; Bank v. Ryan, 64 Pa. St. 338; Bundy, Receiver, v. Town of Monticello, 84 Ind. 119; Pannell v. Hurley, 2 Collier's Reports, 241; Dailey v. Finch, 7 Q. B. Law Reports, 34; Van Allen v. Bank, 52 N. Y. 1; Shaw v. Spencer, 100 Mass. 382; Bank v. Conn. Mut. Life Ins. Co., 104 U. S. 54; Des Moines Cotton Mill Co. v. Cooper, 93 Iowa 654; 1 Perry on Trusts [4 Ed.], sec. 86, p. 75. (2) 2 Daniels on Neg. Ins. [3 Ed.], sec. 1612a, reads: "If a deposit be made in bank to the credit of a certain person as agent or trustee, the use of such terms has charged the bank with notice that the funds were there in a fiduciary relation; it would have no lien on them for the

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private debts of the depositor, and if it permitted them to be used for his private purposes in transactions with the bank, it would be bound." Gregg v. Bank, 80 Mo. 252.

BIGGS, J.—The plaintiff Lindsay is the owner of a judgment against Tudor F. Brooks. An execution was issued on this judgment and the Continental Bank of St. Louis was summoned as garnishee. In the denial of the answer of the garnishee Lindsay averred that at the time of the service of the garnishment Brooks had on deposit in said Bank the sum of $874.22. This was denied by the bank in its reply. By consent of parties there was a reference in the case. On the trial before the referee, Lindsay introduced evidence tending to prove that at the time the garnishment was served the aforesaid sum was deposited with the garnishee to the credit of Tudor F. Brooks, agent. The evidence of the garnishee tended to prove that Brooks was engaged in selling merchandise on commission; that at the time he opened the account with the bank he informed its officers that he was bankrupt and had no money of his own; that the business he proposed to do with the bank would be as agent of various principals, and that the deposit account was opened with him as such agent. The bank introduced Brooks as a witness, who corroborated the testimony of the officers of the bank, and he further testified in a general way that all of the money then on deposit belonged to his principals, except $309, which belonged to his wife. He was unable to state to whom the balance of the money was due, or in what amounts, alleging as an excuse that his books had been burned, and therefore could not state the condition of his accounts with his various principals. He admitted that at times he drew checks on the bank account for his individual uses, but made good the deficits in a short time. Concerning the $309, alleged to be due his wife, he stated that it was derived from a legacy due her from a brother; that a sister of his had remitted the

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amount in a draft drawn in favor of the witness, and that he had deposited the amount of the draft with the garnishee. Upon this testimony the referee found that $309 of the deposit belonged to Brooks, for which amount he recommended a judgment against the garnishee. As to the remainder of the fund, he found that it belonged exclusively to the principals of Brooks, and he recommended judgment against the plaintiff as to it. Both parties filed exceptions to the report of the referee, which the circuit court overruled, and entered judgment in accordance with the recommendation of the referee. The plaintiff appealed from the judgment of the court in refusing to award to him the entire fund, and the garnishee has prosecuted a writ of error from the judgment against it. By consent both causes have been consolidated and treated as cross appeals, and have been presented to this court under one record.

It was conceded at the hearing that none of the alleged principals of Brooks had prior to the garnishment or since made any claim or demand for the money in question. Counsel for Lindsay argue that in the absence of such demand or notification, it was not permissible for the bank to interpose the rights of the alleged owners of the fund in defense of the garnishment. Whatever may be the rule elsewhere, and whatever may be our individual opinions on the subject, the question has been otherwise determined both by the supreme court (McKittrick v. Clemens, 52 Mo. 163), and this court (Brown v. Gummersell, 30 Mo. App. 341). Therefore this point must be ruled adversely to Lindsay.

We extract the following from the report of the referee: "Under the evidence in this case, in my opinion, the deposit of the money under the name of Tudor F. Brooks, agent, together with the fact that at and before the time said deposit was opened, Tudor F. Brooks notified the officers of the defendant that the money deposited in that account would be funds belonging to persons other than himself, and in which

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he would have no personal interest, together with the form in which the account was opened, would be notice to the bank of the fact that said fund was a trust fund. See Gregg v. Farmers & Merchants Bank, 80 Mo. 256.

"This, then, in my opinion, threw the burden upon the plaintiff in this case of showing that the funds on hand at the time of the garnishment was the property of Tudor F. Brooks."

This ruling of the referee was in my judgment erroneous. The facts stated furnished evidence only of notice to the bank that the money did not belong to Brooks. The conclusion of the referee, however, was justified by an expression in the opinion of the supreme court in Gregg v. Bank, *supra*, but the doctrine of that case is overthrown by the subsequent case of Eyerman v. Bank, 84 Mo. 408. In the Gregg case the execution was against the St. Louis, Hannibal and Keokuk Railroad Company. The money garnished was deposited in the bank to the credit of "W. W. Walker, supt." The bank admitted the deposit, but disclaimed knowledge of the true ownership of the money. Gregg averred in his reply that the money belonged to the defendant in the execution. On the trial Walker testified that he was the superintendent of the railroad company, and that the money belonged to his principal, and that he had no interest whatever in it. The plaintiff asked the court to instruct that if the jury found that the money belonged to the railroad company, and that Walker disavowed any claim to it, then it was the privilege of the garnishee to secure an order on Walker to appear and show cause why the money should not be applied to the satisfaction of plaintiff's execution, and in the absence of such an application the verdict should be for plaintiff. The court refused to give the instruction, and this ruling of the court presented the only question for review. The supreme court held that the instruction ought to have been given. The reasons assigned are entirely satisfactory. In the discussion, however,

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Judge Henry remarked that "the manner in which the deposit was made, in this case, was notice to the bank, that the money was not the property of the depositor, but of another." This expression was not necessary to the decision, as the only question in the case had been disposed of on entirely different grounds. It will be observed that although the deposit was made in the name of Walker as superintendent, the jury were required to find from a consideration of all the evidence that the money did not in fact belong to him, but did belong to the defendant in the execution.

The Eyerman case originated in this court (13 Mo. App. 289), and its opinion was in all things affirmed by the supreme court. 84 Mo. 408, *supra*. This court held that money deposited in bank by a county treasurer raises no presumption that it belongs to the county; that the words "county treasurer" added to the depositor's name on his checks or pass book is not notice to any one that the depositor holds the funds as such treasurer, but on the contrary "the presumption as between the parties, is in favor of the personal ownership of the funds by the depositor, and if nothing more appears the bank must be guided in all its transactions by these presumptions." In conclusion the court said: "We think that while the *descriptio personae* was insufficient of itself to impart notice that the dividend draft represented a deposit of money belonging to the city and county, yet all the other facts, when considered in connection with it, made at least a showing proper to go to the jury, for their determination of the question, whether such motive reached the defendant, through its officers, at or before the cashing of the draft. The instruction given was therefore erroneous."

Under the foregong view of the law Lindsay made a *prima facie* case by showing that the money was on deposit in the defendant bank in the name of Brooks, "agent." Presumptively the money belonged to Brooks, and to escape liability under the garnishment it devolved on the bank to

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show by evidence *aliunde* that the fund in fact belonged to third parties. Therefore it is clear to me that under the doctrine of the Eyerman case, which is the last decision of the supreme court on the question, the opinion of the referee, as to the burden of proof and as to the legal effect of the facts hypothetically stated by him, was erroneous, and consequently the order of the circuit court overruling the exceptions of Lindsay to this portion of the finding of the referee and the judgment of the court thereon, were likewise erroneous. The evidence in favor of the trust fund theory is not of such a character as to justify us in treating these erroneous rulings as harmless error. The testimony of Brooks as to the ownership of the money is by no means satisfactory. He professed to represent several wholesale dealers in the sale of goods, but he could not state to which company or companies the money belonged. The excuse that his books were burned, was not sufficient. The condition of his accounts with his various principals could have been readily obtained. He admitted that he had been in the habit of mixing his own money with the alleged trust money, and that he would occasionally use a portion of the trust money for his individual uses. Under these admissions and the other circumstances the best evidence obtainable ought to have been produced to prove that at the time of the garnishment Brooks was actually indebted to his principals to the extent of the deposit. The foregoing are my individual views. My associates are of the opinion that the decision in the Gregg case is controlling, and that the rulings of the referee were right. Therefore the judgment as to this branch of the case should be affirmed.

The finding of the referee that that portion of the fund which was claimed by the bank to belong to Brooks' wife was in fact the property of Brooks, is justified by the evidence. The statement of Brooks was that this money was the proceeds of a draft sent to him by his sister who lived in Virginia;

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that the draft was made payable to his order; that the money belonged to his wife, and came from the estate of a brother who died in Virginia. Whether it was the estate of his (Brooks') brother or his wife's brother, Brooks failed to state. Neither did he make any explanation of the unusual facts that the money was sent by his sister and that the draft was made payable to his order. Under this evidence the conclusion is justly warranted that Brooks was the real owner of the money. Hence we must approve of the finding of the referee as to this portion of the fund.

Under the views of my associates the judgment of the circuit court must in all things be affirmed. The costs will be taxed equally.

SEPARATE OPINION.

BLAND, P. J.—I agree that the judgment should be affirmed, but I am unable to agree to the discussion in the opinion of Judge Biggs. I think the conclusion reached by the referee that the information given by Brooks, that his account was an agency one, and the fact that the account was kept by the bank as an agency account, was notice to the bank that the deposit was a trust fund and not the individual money of Brooks; nor do I think the ruling in Gregg v. Bank, is in the least shaken by the ruling in the case of Eyerman v. Bank, 84 Mo. 408. In its discussion of the case by the court of appeals (13 Mo. App. loc. cit. 291), the court went out of the record to remark, that the fact that Herman Rechtien, county treasurer, deposited money in the bank to the credit of "Herman Rechtien, county treasurer," was not notice to the bank that the money so deposited was county funds. This question was not in the case; but the question was whether the addition of the words "county treasurer" written in a draft after the name of the payee, was notice to a bank to whom the draft was presented for discount by the payee, that the draft was a trust fund. It was correctly ruled that it was

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not; that the addition of the words "county treasurer" were but *descriptio personae.* This ruling is in accord with all the authorities, but is quite a different question from the one passed on in the Gregg case. In the latter, as in the case in hand, the question was between the bank as garnishee and the creditor of the depositor, who kept his account with the garnished bank in the name of Walker, superintendent. It was ruled by the supreme court that the fact that the deposit was made by Walker as superintendent, and not in his individual name, was notice to the bank that the deposit account was a trust fund. The Gregg case is supported by the following authorities: Duckett v. Bank, 39 L. R. A. 84, where it is held that a check stating that it is for deposit to the credit of a person named with the word "trustee" added to his name, is an explicit notification to the bank that he is not the actual owner of the money. The same ruling was made in Ihl v. Bank, 26 Mo. App. 129; and further that the bank would not be justifiable in paying out the money on a check signed by the individual name of the depositor, without the addition of the word trustee. Substantially the same ruling was made in Paul v. Draper, 73 Mo. App. 566 and 143 Mo. 652. In National Bank v. Insurance Company, 104 U. S. 54, it was held that a bank deposit designating "A. H. Dillon, Jr., Gen'l Agt. Cr.," was notice to the bank that the moneys deposited under this designation was a trust fund, and not the private moneys of Dillon, Jr. At page 832, 3 Am. and Eng. Ency. of Law, it is said a deposit to the credit of A. B. trustee, is notice to the bank that A. B. is not the actual owner. Morse on B. & B., sec. 604, says that "such additions are not of themselves sufficient to give notice, but that something else is required, as for instance, where the depositor keeps two accounts in the same bank, one in his individual name, and one as trustee." If it be conceded that this is the better rule, the evidence is not lacking in this case to notify the bank that Brooks' deposit account was of

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trust funds, for he so declared it to be when he first opened the account, and informed the bank of the nature of his business and in what capacity he received moneys. At section 491a, Drake on Attachments, it is said: "Where money is deposited in a bank by one as agent, and the account is understood by the depositor and the bank to be an agency account, it may be attached as the money of the principal, but can no more be subjected by garnishment to the payment of the agent's debt, than any other money of his principal could be. And in such case the account itself is notice to the bank that the money is not the defendant's. Where the defendant mixes his own money in the agency account, of course it can be reached so long as it remains on deposit, by garnishing the bank." That is what was done in this case. The referee found what portion of the deposit account belonged to Brooks individually, and what part was trust funds. His report was approved by the court and judgment rendered against the garnishee for the amount found to be the money of Brooks. On cross appeal the garnished bank complains of this action of the court, and contends that the bank was bound to honor all checks drawn by Brooks, agent, so long as funds were on deposit to the credit of the agency account, and that having honored his checks to the exhaustion of the account, no judgment could be rendered against it as garnishee. As a general proposition the bank was bound to honor Brooks' checks when properly signed, so long as he had funds to his credit as agent. But when process of garnishment was served on the bank, it was notice to it that plaintiff would undertake to establish the fact that the account was not an agency one, but that the moneys deposited by Brooks to the credit of that account was the individual money of Brooks. In such circumstances the bank had the right to hold the funds, to abide the result of plaintiff's claim, and it seems to us that the exercise of ordinary business prudence would have induced the bank to have held on to the fund

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until the issue of the true character of the account could be judicially settled. Payments made by it after service of the garnishment, were at its risk. It took the risk and paid out the moneys which had been attached in its hands as the moneys of Brooks, and which on trial were shown to be Brooks' moneys. The bank took the risk, and it must abide the consequences. Judge *Bond* concurs in the views herein expressed.

JULIUS S. RECHNITZER, Respondent, v. ST. LOUIS CANDY COMPANY, Appellant.

St. Louis Court of Appeals, January 2, 1900.

1. **Justice's Court:** PLEADING AND PRACTICE: STATUTORY CONSTRUCTION. Where a written order is the basis of an action before a justice of the peace, it should be filed with the justice (sec. 6138, R. S. 1889), and under the terms of the statute no process ought to have issued.

2. **Practice, Appellate.** This omission makes the reversal of the judgment imperative.

3. ———: ———: ———: AMENDED STATEMENTS. The Revised Statutes 1889, sec. 6349, only permit essential amendments in the circuit court of statements filed before justices when it shall be made to appear from the statement filed before the justice, that it was "intended" to include the amendment prayed for, and in the case at bar there is nothing in the statement filed in this cause before the justice which indicates any specific allegation necessary to the legal sufficiency of the statement "intended" to be included in such statement.

Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

REVERSED.

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Frank A. C. MacManus for appellant.

(1) The verdict was against the law. As will be seen by an examination of the record, the alleged "contract" or order was never filed or sued upon. The tabulated statement of figures filed is not sufficient to constitute a cause of action. Sections 2088, 6138, 6139, G. S.; Rosenberg v. Boyd, 14 Mo. App. 429; Swartz v. Nicholson, 65 Mo. 508; Morrow v. Sturver, 97 Mo. 161; Nutter v. Houston, 32 Mo. App. 451; Butts v. Phelps, 79 Mo. 302; Hill v. Ore and Steel Co., 90 Mo. 670, 104; Brashears v. Strock, 46 Mo. 221; Weese v. Brown, 28 Mo. App. 521; Leas v. The Pacific Express Co., 45 Mo. App. 598. (2) The failure to file or sue upon a contract only signed by one of the parties to the action, not cured by an amendment of some kind to the pleadings, was fatal. No jurisdiction was ever obtained in the cause. Demurrers do not obtain before justices or causes appealed from justices. Kane v. Dauerheim, 51 Mo. App. 636.

John C. Robertson for respondent.

(1) The appellant's counsel contends in his brief that the only pleading in the case is a bill copied in his brief, and that no contract, or order, as he is pleased to call it, was filed. In reply I quote from the record, page one: "Be it remembered that, heretofore, to wit, on the 27th day of September, A. D. 1898, there was filed in the office of the circuit clerk, city of St. Louis, within and for the city, aforesaid, a transcript and accompanying papers, etc." The fact is, that the contract, or order, was filed before the justice and by him sent to the circuit court, and has never been out of the courthouse since, and was offered in evidence at the hearing of this cause on both occasions. "If the instrument sued on is not filed and no reason given for not filing it, the objection must be made

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by motion to require the party to file it." Christey v. Railway, 94 Mo. 453; Kingsland & Ferguson Mfg. Co. v. St. Louis Malleable Iron Co., 29 Mo. App. 526. (2) The point can not be raised for the first time in the appellate court. Failure to file note sued on can not be assigned for error in the supreme court, unless the objection was made in the court below. Peake v. Bell, 65 Mo. 224. Appellant says in its brief that the St. Louis Candy Company is sued, but that the pleadings fail to state whether the same is a corporation or co-partnership, etc.

BIGGS, J.—This action was commenced before a justice of the peace. The following paper was filed as a testament of plaintiff's cause of action, to wit:

"J. S. Rechnitzer, publisher of Hopkins Grand Opera House program and all first-class advertising mediums.

"St. Louis, June 1, 1898.

St. Louis Candy Company, Ninth and Gratiot Sts.

1897.		
Sept. 26, Hopkins, 8-29; 9-5-12-19 & 26..	$20.00....	$25.00
Oct. 31, Hopkins, 10-3-10-17-24-31......	20.00....	25.00
Nov. 28, Hopkins, 11-7-14-21-28........	20.00....	20.00
Dec. 26, Hopkins, 12-5-12-19-26........	20.00....	20.00
1898.		
Jan. 30, Hopkins, 1-2-9-16-23-30.......	$20.00....	$25.00
Feb. 27, Hopkins, 2-6-13-20-27........	20.00....	20.00
March 27, Hopkins, 3-6-13-20-27.......	20.00....	20.00
April 24, Hopkins, 4-3-10-17-24........	20.00....	20.00
May 28, Hopkins, 5-1-8-15-22.........	20.00....	20.00
		$195.00"

There was a judgment before the justice for forty dollars, from which the plaintiff appealed. In the circuit court the cause was submitted to the court without a jury. The sufficiency of the statement was not challenged, either before

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the justice, or in the circuit court, and no objection was made in the circuit court to the introduction in evidence of the following order upon which plaintiff's alleged cause of action is based, to wit:

"J. S. Rechnitzer, Publisher:

"Please insert our advertisement in the Hopkins' Grand Opera House program for the season of 1897 and '98, for which we agree to pay $20 for four weekly issues, payable monthly.

"Accepted by the St. Louis Candy Company,

"E. J. Wamganz, Secretary."

The defense was that the order for the advertisement in question was secured by plaintiff through his fraudulent representations that he could and would secure for defendant the exclusive sale of all candies to the Hopkins Grand Opera Company during the existence of the contract, and that the said purchases would amount to about four thousand five hundred dollars per annum; that this agreement was carried out by the Hopkins Company for six or eight weeks, when the company ceased to buy candy from the defendant, and that the defendant thereupon elected to cancel the contract and notified the plaintiff to discontinue the advertisement. The circuit court rendered judgment in favor of plaintiff for the entire amount. The defendant has appealed. It complains of the insufficiency of the statement; that the order was not filed with the justice, nor in the circuit court; that the court erred in rejecting competent testimony offered by the defendant; that the court erred in refusing proper instructions, and that it erred in refusing to order a new trial on account of newly discovered evidence.

There is nothing in the record to show that the written order was filed, either with the justice, or in the circuit court, and the defendant now urges this as a ground of reversal. It is somewhat doubtful whether the action is based on the

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order, or is a suit on account for services rendered under the order. But treating the order as the basis of the action it should have been filed with the justice (section 6138, R. S. 1889), and under the terms of the statute no process ought to have issued. This omission makes the reversal of the judgment imperative. My associates are of the opinion that the cause should be dismissed for want of jurisdiction. To that I can not consent. I think that the cause ought to be remanded, thus affording the plaintiff an opportunity to amend by filing the instrument. Clearly this right of amendment was open to the plaintiff when the case first reached the circuit court (Dowdy v. Wamble, 110 Mo. 280), and he ought not now to be deprived of it, as no objection was made in the lower court. The tendency of legislation has been to discourage technicalities in pleadings, especially in causes begun before justices of the peace.

The judgment of the circuit court will be reversed and the cause dismissed. Judge *Bond* expresses his views in a separate opinion.

SEPARATE OPINION.

BOND, J.—The cause of action filed in this case before the justice (quoted in Judge Biggs' opinion) consisted of the names of two parties followed only by an array of figures. It was and is a mere nullity, so far as setting forth any legal right or liability in favor of or against any person, natural or artificial, for any services or consideration whatever. It was therefore fatally defective under the multiplied decisions of the appellate courts of this state. No attempt was made to amend it when the cause was appealed to the circuit court from the justice. On the appeal to this court its legal insufficiency, as the statement of any cause of action, is urged as a ground of reversal of the judgment against the defendant in the circuit court. When the first draft of Judge Biggs' opinion was sent

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to me it appeared therefrom that he thought the recovery of the plaintiff in the circuit court in excess of his recovery in the justice's court, should be reversed and the judgment should be affirmed for the amount of plaintiff's recovery in the justice's court. I was unable to see any ground upon which any portion of the judgment could be affirmed, and held that it should be reversed *in toto*, in which view Judge Bland concurred, and which view is now conceded in the opinion of Judge Biggs, who, however, thinks the cause should be remanded for an amendment of the statement. In this latter view we are unable to concur, first, because we do not think that the amendment could be properly effected in the way suggested by him; i. e., by filing the written order for the performance of the work. That order is not the foundation of the suit for services rendered; it is only evidence of the authority to perform services; it is no evidence of the actual performance of such services, and unless this was shown no cause of action could arise, hence we do not see how the filing of a portion of plaintiff's evidence could validate an abortive statement of his cause of action; secondly, as the statement filed by plaintiff before the justice gives no legal intimation of his purpose to set forth any cause of action, we are aware of no authority for the subsequent amendment of such statement in the circuit court. For the statute and decisions of the supreme court "only permit essential amendments in the circuit court of statements filed before justices, when it shall be made to appear from the statement filed before the justice, that it was 'intended' to include the amendment prayed for." R. S. 1889, sec. 6347. Dowdy v. Wamble, 110 Mo. 280. There is nothing in the statement filed in this cause before the justice which indicates any specific allegation (necessary to the legal sufficiency of the statement) "intended" to be included in such statement. We therefore adhere to the opinion that the judgment in this cause should be simply reversed. In so doing we deprive the plaintiff of no just right to recover,

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since he may hereafter bring a new action, based on a statement legally sufficient to apprise defendant of what is demanded and to bar another suit, if he is so advised; but the present judgment in his favor is, with the concurrence of Judge Bland reversed.

Judge *Bland* concurs in this opinion.

ASSIGNMENT OF THE ELAINE BUILDING AND LOAN ASSOCIATION, WM. HAGERSDORF, Respondent, v. NORFLEET HILL et al., Appellants.

St. Louis Court of Appeals, January 2, 1900.

1. Assignee, Compensation of: RULE OF CIRCUIT COURT, DISCRETION OF JUDGE. The statutes of this state do not fix the amount to be allowed an assignee for the discharge of his duties as such under the superintendence of the circuit court, but leave that question to the judicial discretion of the judge.

2. ——: ——: ——: REASONABLE VALUE OF SERVICE OF ASSIGNEE AND ATTORNEY. The rule adopted by the circuit court of the city of St. Louis, "that under no circumstances shall the amount to be allowed an assignee by the court for his compensation and that of his ordinary counsel fees together exceed fifteen per centum of the estate received and disbursed by said assignee, provided, however, this rule is not to apply to attorneys' fees in litigated cases prosecuted or defended by the assignee in behalf of the estate," was intended to express the judgment of that court as to the reasonable value of the allowances to be made for all matters falling within the classification set forth in the rule.

Appeal from the St. Louis City Circuit Court.—*Hon. William Zachritz*, Judge.

AFFIRMED.

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W. C. & J. C. Jones for appellant.

(1) The allowance of the lower court is unreasonable. The evidence, on which the court in this, as in other cases, must act, all shows that the services rendered by the attorneys were worth far more than the amount allowed. LeBrun v. Boulanger, 56 Mo. App. 41; Mullinix v. Catron, 2 Mo. App. 341; State v. Grabell, 69 Mo. App. 536. (2) The rule of court restricting the amount allowable to assignees and their attorneys is void because unreasonable, because it is in contravention of the statutes of this state and undertake, in advance of any investigation, to limit the amount of compensation to assignees and the amount which they may pay for necessary legal services. Purcell v. Railroad, 50 Mo. 504; Calhoun v. Crawford, 50 Mo. 458; State ex rel. v. Gideon, 119 Mo. 98; State v. Withrow, 135 Mo. 382; State ex rel. v. Withrow, 133 Mo. 522; State v. Bryant, 55 Mo. 75; State v. Underwood, 75 Mo. 230. (3) The rule of court is inapplicable to the case presented, or the court improperly construed the rule. (4) Though the rule be valid, the enforcement of it lies in the discretion of the trial court, and it was an abuse of that discretion to enforce it (as construed by the court) in this case. Kuh v. Garvin, 125 Mo. 547.

No brief furnished for respondent.

BOND, J.—On the Twentieth of November, 1894, the Elaine Building and Loan Association, a corporation, made an assignment for the benefit of its creditors. The assignee retained J. C. and W. C. Jones as his attorneys. In 1898 he filed a term report showing a balance in his hands of $1,196.83, and prayed an allowance for his own services and those of his attorneys, the itemized account for the latter aggregating $895, upon which a credit was entered of $100, leaving the balance claimed $795. J. C. Jones testified as to

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the services rendered. Upon the basis of his evidence in this respect other witnesses testified the amount charged was reasonable. The matter was submitted to the trial judge, who made the following order of allowance:

"The court having heard and duly considered the application of the assignee and his attorneys for allowances to them for their services herein, and the evidence adduced in support thereof, and it appearing to the court that by section 3 of rule 36 of this court, the court is restricted in the compensation it may allow to assignees and their attorneys to fifteen per cent of the amount actually received and disbursed by the assignee (except that the court may make a further allowance for attention to litigated cases), which rule is as follows: 'Sec. 3. The rate of compensation that will be allowed by the court to an assignee shall ordinarily be not more than that fixed by statute for administrators of estates to the decedents, and the amount that may be allowed him for ordinary counsel fees shall not exceed one-half of the amount of his own compensation. In an ordinary case, and on satisfactory proof, the assignee may be allowed a higher rate of compensation than that above named, but under no circumstances shall the amount to be allowed him by the court for his compensation and that of his ordinary counsel fees together exceed fifteen per cent of the estate received and disbursed by him, provided, however, this rule is not to apply to attorney's fees in litigated cases prosecuted or defended by the assignee in behalf of the estate.'

"And it further appearing that the total amount received and disbursed by said assignee was only $4,500, fifteen per cent of which sum is $675, the court doth order the assignee to pay to his said attorneys the further sum of $600 in full for their services rendered, and to be rendered herein ($375 of which sum is allowed for general services to the estate, and $225 thereof for attention to litigated cases), and that the assignee retain the sum of $300 in full for his services as

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assignee. The court is of the opinion, and the evidence discloses, that the services of the attorneys are worth all that they claim, to wit, the sum of $895, and that the services of the assignee are worth more than has been allowed to him, but in view of section 3 of rule 36 of this court, restricting compensation that may be allowed to assignees and their attorneys, by which rule this court is bound, the court declines to make any further allowance than as above stated."

From this judgment the assignee appealed to this court.

It is insisted by appellant that the trial court erred in applying to the allowances requested by him the rate of fees for such services contained in the rule of the St. Louis circuit court, set forth in the foregoing judgment. The rule in question was adopted by the St. Louis circuit court in general term to afford a just and equal basis of allowances in its several divisions for the services and expenses incurred by assignees in the administration, under the orders and direction of the court, of assigned estates. The object of the rule is salutary and wholesome, for it is only just that the same sums should be paid in one division of the court which are paid in all others for the same services. The schedule fixed was adopted, after consultation and agreement, among the judges of the respective divisions of the court. Its fairness may be reasonably assumed in view of the experience of the judges of the St. Louis circuit court in supervising the administration of assigned estates, and their competency to estimate the value of the services rendered by the assignee and what should be allowed him for legal assistance in the instances mentioned in the rule. Courts are empowered to make all needful rules for the just and proper conduct of the business entrusted to them, which do not prejudice vested rights. The statutes of this state do not fix the amount to be allowed an assignee for the discharge of his duties as such under the superintendence of the circuit court but leave that question to the judicial discretion of the judge. We do not think this was abused by

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the adoption of the rule in question. Of course, the rule does not affect the rights of the attorneys of the assignee, for they have no direct claim as such against the assigned estate, and are entitled, as against the assignee, to the reasonable value of the services rendered at his instance, irrespective of what the court might allow him to cover such expenses. Prior to the adoption of the rule in question the assignee was entitled to be reimbursed, on account of counsel fees necessary to the discharge of his trust, to an allowance equal to their reasonable value. But he sustained no direct relationship with the court, nor did any statute fix the sum which he was entitled to receive on this account. His right to such allowance depended solely upon proof that the counsel fees were legitimately incurred, and of their reasonable value, upon which evidence the amount to be allowed was lodged in the sound discretion of the court wherein the trust was administered. The rule adopted by the St. Louis circuit court was intended to express the judgment of the court as to the reasonable value of the allowances to be made for all the matters falling within the classification set forth in the rule. If the assignee was not satisfied with the sums therein specified, he could have declined to act as such, but having performed his duties under the directions of the court, and in the light of the rule governing a portion of the allowances which he would be entitled to receive, he is in no position now to complain of his failure to receive a greater sum. The result is that the judgment herein is affirmed. All concur.

G. W. BALDWIN, Respondent, v. GEORGE BOULWARE, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Costs**: APPELLATE PRACTICE: PRINTING ABSTRACT. An appellant on a reversal of the judgment below, where the appeal is on the short method, is entitled to the costs of printing the abstract when it conforms to the rules of court.

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2. ——: COMMON LAW: STATUTE: CONSTRUCTION. The right to recover costs does not exist at common law but by statute alone, and such statute must be strictly construed.

3. ——: STENOGRAPHER'S FEES: STATUTE: COUNTIES OF 45,000. The statute providing for stenographers in counties of 45,000 inhabitants and less makes only two provisions for taxing costs relating to stenographers, to wit: Two dollars for each case tried and five cents per one hundred words allowed the clerk for the transcript furnished him by the stenographer in cases of appeal, and an appellant can not recover fees paid the stenographer for a transcript, and such fees can not be charged up as costs of suit.

Appeal from the Barton Circuit Court.—*Hon. D. P. Stratton*, Judge.

MOTION SUSTAINED IN PART AND OVERRULED IN PART.

H. W. Timmonds for appellant.

(1) Respondent's suggestion is that appellant ought not to be allowed for printing the abstract because it was not an abstract of the entire record. As it was it contained 224 pages. The testimony of some sixty witnesses was very much abbreviated. Enough appeared to warrant this court in reversing the judgment and remanding the cause. (2) The law relative to fees for the stenographer's transcript is a fixed fee of "ten cents per folio of one hundred words," and in all cases of appeal it is made the duty of the stenographer, upon the application of the appellant to make out a transcript of his notes of the evidence, to be paid for at the rate above mentioned. R. S. sec. 8251. This was done in this case. The stenographer's fee, paid by appellant, has not been taxed by the clerk in this case. It is important that it be now done by the court. It is part of the cost of the appeal; the law fixes the fee, and this court has very properly adjudged all costs of the appeal against respondent. It is just as properly taxable against him as is the docket fee paid to the clerk of this court.

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Cole & Burnett for respondent.

(1) Respondent suggests to the court that the stenographer's fees of three hundred dollars should not be taxed against this respondent for the reason that there is no warrant of law for so doing. (2) Because any expense that the appellant or respondent may have been to by way of getting a copy of the testimony from the court stenographer can not be assumed to be a part of the cost of his printed abstract. (3) The expense a party may make in filing a bill of exceptions can no more be allowed against his adversary than the cost of filing a motion in the cause, or the cost and expense laid out for the services of attorneys, railroad fare, or hotel bills.

GILL, J.—At the March term, 1898, an opinion in this case was handed down reversing the judgment and remanding the cause. At that term respondent filed motion for rehearing and at the same time made an offer to remit the damages awarded on one count of the petition. During the said March term also the appellant filed his motion asking an allowance for the cost of printing the abstract. Both these motions went over to the October term, 1898. When plaintiff's offer to remit was accepted and the former order was so modified as to enter a judgment here for the plaintiff on the other three counts of the petition, to which the remitter did not apply. But by oversight the motion to tax costs which had been at the previous term filed by the appellant was not disposed of and the same was still pending in May, 1899, when the appellant filed a supplemental motion asking this court to tax against the respondent (in addition to the costs of the abstract) the further sum of $300 which the appellant paid to the stenographer of the circuit court for transcribing the evidence

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adduced at the trial, and which had not been taxed up by the circuit clerk.

We now proceed to dispose of the two motions above mentioned—that is, the one asking an allowance of $145.60 for printing appellant's abstract, and the other, requesting this court to tax against the respondent the further sum of $300 paid the court stenographer for furnishing transcript of the notes of evidence taken at the trial.

I. We hold the appellant entitled to an allowance for printing the abstract. It was reasonably sufficient, and set forth all of the record that was "necessary to a full understanding of all the questions presented to this court for decision," as required by our rule 15; and in accordance therefore with section 2253 of the Revised Statutes, a reasonable charge therefor should be taxed against the respondent. We will then direct the usual charge of sixty cents a page or $134.40 for the 224 pages, to be taxed against the respondent and in favor of the appellant.

II. We fail however to find any lawful authority for taxing against the respondent the compensation which the appellant paid to the stenographer. At common law no costs were allowed. The right thereto can exist only when provided by statute, and it is a well established rule that such statutes are to be strictly construed. Shed v. Railroad, 67 Mo. 687; In re Green, 40 Mo. App. 491.

III. Turning now to the several statutes relating to court stenographers, pages 1915 to 1922, Revised Statutes 1889, and we find five separate and distinct articles providing for court stenographers in counties of different population. The first statute relates to stenographers in counties having a population of 350,000 or more; the second to counties of more than 100,000 and less than 350,000 population; the third to stenographers for counties having more than 45,000 and less than 150,000 inhabitants; the fourth article providing for stenographers in counties of 45,000 or less population, etc.

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Barton county then having a population less than 45,000, comes within the provisions of the act last referred to. Under this statute the judge of the circuit court is authorized to appoint a stenographer whose duty is to attend the sessions of the court, "and who shall, when directed by the court, take full stenographic notes in every case tried of all the oral testimony, the admissions made by either side, the objections to testimony, etc. * * *; and shall preserve and furnish a transcript of such stenographic notes, or all or any part thereof, to any person having an interest therein, upon the payment of the fee hereinafter prescribed." Section 8248. Then follows section 8251 providing that "such persons calling for a transcript shall pay the stenographer as compensation ten cents per folio of one hundred words; and in all cases of appeal or writ of error it shall be the duty of such stenographer, upon the application of the appellant or plaintiff in error, to make out upon a typewriter two transcripts in duplicate of his notes of the evidence, or such parts thereof as may be requested, one of which copies he shall deliver to the party ordering the same, and the other deposit with the clerk * * * for which said stenographer shall be entitled to be paid for one copy only at the rate hereinbefore prescribed." It is then made the duty of the clerk to incorporate the copy furnished him by the stenographer into the transcript sent to the appellate court, and for this portion of the transcript the clerk is allowed as his fees five cents per hundred words.

We have thus quoted every provision of the statute relating to the employment of the court stenographers in counties of the size of Barton county which can in any way bear on this question, except section 8250, which provides that said stenographer shall be paid for his attendance at court $5 a day out of the county treasury and, except the further provision contained in section 8249, which directs the circuit clerk to "tax up the sum of two dollars, to be collected as other costs, and thereupon to be paid by said clerk to the

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county treasurer to apply to the payment of salary of such stenographer." And it will be seen that there is no express authority to tax as costs any sum or sums of money that any litigant may have paid to the stenographer for a transcript of such portions of the evidence that said party may see proper to order. The only items of cost relating to the stenographer and required by this act to be taxed are first the $2 for each case tried and second the five cents per hundred words charged for that portion of the stenographer's report that shall enter into the transcript made by the clerk for the appellate court. There is nothing in the entire statute relating to the court stenographer for counties of 45,000 inhabitants or less, that even by fair implication authorizes the compensation paid by the appellant to the stenographer to be charged up as costs in the case. Indeed the implication is rather against the right to have such expenses charged as costs of the case. The mere fact that provision is made for the taxing up of the $2 to each case, and that the five cents per hundred words is taxed for that part of the stenographer's transcript which is incorporated in the record sent up to the appellate court, tends to show that it was not the intention of the law to charge an additional sum to cover the amount paid by the appellant to the stenographer. *Expressio unius, exclusio alterius.* In providing for stenographers in counties of more than 100,000 and less than 350,000 inhabitants, the legislature intended such fees paid to the stenographers to be taxed as costs and the act plainly expressed that intention. See section 8327, Revised Statutes. Is it not then a reasonable inference that the failure to provide for taxing such expenses in a case tried in a county of 45,000 or less, was intended not to allow such matters to be charged up as costs of the suit?

It results then from these considerations that we allow the cost of printing appellant's abstract and direct the same to the extent of $134.40 to be taxed against the respondent, but deny the motion asking for the stenographer's fees. The Judges all concur.

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ELIZA MARKHAM, Respondent, v. EMERY HERRICK, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Appellate and Trial Practice:** DISCRETION OF COURTS: LIMITING WITNESSES. It is within the discretion of the trial court to limit the number of witnesses on a particular point, and unless abused appellate courts will not interfere. Such discretion should be exercised with caution lest abuse and injury to the rights of litigants ensue.
2. **Marriage:** BREACH OF PROMISE: CHASTITY: BAR OR MITIGATION. In an action for breach of promise the character of the plaintiff is material matter, since all promises of this kind are founded upon the presumption of the chastity of the woman; and unchaste conduct, and consequently bad reputation, if not a bar, is proper matter in mitigation of damages.
3. **Evidence:** BREACH OF PROMISE: GENERAL REPUTATION: LIMITING WITNESSES. A rule limiting the number of witnesses on a given point should be announced before the trial that the parties may select their important witnesses; and in an action of breach of promise, limiting defendant to three witnesses on the general reputation of the plaintiff—two of whom are plaintiff's witnesses and testify on cross-examination—without announcing such ruling before the question is gone into, is not a sound exercise of the discretion of the trial court to limit the number of witnesses.

Appeal from the Cole Circuit Court.—*Hon. D. W. Shackleford*, Judge.

REVERSED AND REMANDED.

F. M. Brown and *Edwin Silver* for appellant.

(1) The trial court erred in excluding the testimony of the witness, Frank Henderson, offered by defendant to show that the general reputation of plaintiff for chastity and morality was bad. Evidence in mitigation of damages is admis-

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sible under the general denial. Boggess v. Railway, 118 Mo. 328, 338; Gregory v. Chambers, 78 Mo. 294; Kniffin v. McConnell, 30 N. Y. 285; Beck v. Dowell, 40 Mo. App. 71. And evidence of bad character of plaintiff for chastity is admissible in breach of promise actions. Cole v. Holliday, 4 Mo. App. 94; Davis v. Slagle, 27 Mo. 600; Green v. Spencer, 3 Mo. 318; 2 Am. and Eng. Ency. of Law, p. 528. So plaintiff having already testified as a witness on her own behalf, the evidence was competent to impeach her credibility. State v. Cooper, 71 Mo. 436; State v. Raven, 115 Mo. 419; State v. Weeden, 133 Mo. 70. (2) Nor can the exclusion of the evidence be sustained on the ground stated by the trial judge that defendant "had exhausted the rule of the court limiting a party to three witnesses to establish any one fact." The mere oral remark of the court was not sufficient to establish the existence of the rule referred to. 1 Elliott's General Practice, sec. 186; Risher v. Thomas, 2 Mo. 99; State v. Bryant, 55 Mo. 75; State ex rel. v. Gideon, 119 Mo. 94; Purcell v. Railway, 50 Mo. 504; Ward v. Dick, 45 Conn. 235; Green v. Ins. Co., 134 Ill. 310; Underhill on Evid., sec. 381.

Pope & Belch for respondent.

(1) Courts have a right to make rules; have that inherent power. Risher v. Thomas, 2 Mo. 98; Brooks v. Boswell, 34 Mo. 474; State ex rel. v. Tolle, 71 Mo. 645; Gannon v. Fritz, 79 Pa. St. 303; Daily v. Green, 3 Harris (Pa.), 118; 4 Am. and Eng. Ency. of Law [1 Ed.], 450. (2) Evidence of specific acts not admissible. Seymour v. Farrell, 51 Mo. 95; State v. Rogers, 108 Mo. 202; State v. Beaty, 25 Mo. App. 214. (3) No defense, if defendant had knowledge of bad character, when contract was made. 2 Suth. on Dam., sec. 990; Snowman v. Wardwess, 32 Me. 275; Denslow v. Van Horn, 16 Ia. 476; State v. Thornton, 108 Mo. 640; 2 Sedg. on Dam., sec. 641; Sprague v. Craig, 51 Ill. 289; Lecky v.

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Bloser, 24 Pa. St. 401; Field on Dam., sec. 94; Suthard v. Rexford, 6 Cow. 254; Hattin v. Chapman, 46 Conn. 607; Glasscock v. Shell, 57 Tex. 215.

GILL, J.—This is an action for breach of promise of marriage—the petition alleging mutual promises made in November, 1897, and at various times thereafter until March 9, 1898, when defendant married another party, thereby putting it out of his power to comply with his contract to marry the plaintiff. The alleged marriage contract was denied in the answer. On a trial by jury, plaintiff had a verdict and judgment for $500, and defendant appealed.

I. One of the principal matters complained of relates to the action of the trial court in excluding certain witnesses offered by defendant to attack the character of the plaintiff for chastity and morality. The objection goes rather to an improper limitation on the number of witnesses allowed defendant to establish plaintiff's bad character. It seems that after the plaintiff had testified in relation to the contract of marriage had with the defendant, and other corroborating witnesses had been produced in plaintiff's favor, the defendant's counsel asked two of these witnesses, on cross-examination (after they were shown to be qualified to testify in relation thereto), as to the general reputation of plaintiff for chastity and morality, and they testified that it was bad. After, then, the plaintiff's evidence was all in, and defendant had testified, denying the alleged contract of marriage, etc., defendant's counsel introduced one witness, who testified that he had known plaintiff for several years and was acquainted with her general reputation for virtue and morality, and that it was bad. Counsel for defendant then proceeded to introduce further testimony attacking the character of the plaintiff, but the court, of its own motion, stopped the counsel and refused to permit any other witness to testify as to plaintiff's character—stating at the time, in effect, that to introduce

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more than three witnesses to establish any one fact was contrary to the rules of the court. To this ruling, the defendant saved an exception. In rebuttal, plaintiff introduced witnesses whose testimony tended to prove that her reputation for chastity and morality was good.

Although the power seems to be denied by some of the authorities, it may yet be considered as the settled rule in the majority of jurisdictions that a trial court has a discretion to limit the number of witnesses on a particular point, and unless an abuse of that discretion appears the appellate courts will not interfere. It is however a matter of some delicacy, and the power should be exercised with caution. For if too freely indulged in, there is danger of great abuse and probable injury to the rights and interests of litigants. But in cases where there is no real dispute as to the fact concerning which the witnesses testify, and which may be developed during the trial, or in cases of expert testimony, or even beyond these when the introduction of a great number of witnesses tends mischievously and unnecessarily to protract the trial, the court may interfere and stop examinations which are merely cumulative in their nature. 1 Wharton on Ev., sec. 505 (3 Ed.); 2 Elliott's Genl. Prac., sec. 564; Underhill on Ev., sec. 381; Best on Ev., sec. 596; State v. Whitton, 68 Mo. 91; State v. Lamb, 141 Mo. 298; Ward v. Dick, 45 Conn. 235; Green v. Ins. Co., 134 Ill. 310; Bunnell v. Butler, 23 Conn. 65; Gray v. St. John, 35 Ill. 222.

II. But it seems to us that the court below harshly and arbitrarily exercised the power in this particular case. The character of the plaintiff was a material matter in this controversy. Even to concede that defendant proposed and plaintiff accepted an offer of marriage, yet if the plaintiff was at the time, and without the knowledge of the defendant, unchaste, then defendant had the right to decline marriage. "All promises of this kind are founded upon the presumption of chastity on the part of the woman." 3 Sutherland on Damages, sec.

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989 (2 Ed.). But whether a bar to the action or not, the unchaste conduct of the plaintiff, and the consequent bad reputation therefor was proper matter in mitigation of damages. 3 Sutherland on Damages, *supra*; Cole v. Holliday, 4 Mo. App. 94. It is also well established that such bad character for morality was competent as tending to impeach plaintiff's credibility as a witness. State v. Raven, 115 Mo. 419; State v. Weeden, 133 Mo. 70.

III. The defendant, then, should have had a reasonable opportunity to prove his side of the case, and to establish by proof the alleged bad character of plaintiff. But this was not given him under the arbitrary ruling of the court. The defendant was allowed to introduce on his own account the one single impeaching witness. By cross-examination, it is true, defendant's counsel drew from two of plaintiff's witnesses the admission that plaintiff's general reputation was not good. But these can hardly be deemed witnesses of the defendant's choosing. Even, however, if so treated, yet in an issue of that character the court was not justified in stopping the defendant from introducing further witnesses—especially in view of the fact that plaintiff had introduced witnesses to sustain her alleged character. The record does not support the assertion of plaintiff's counsel, made at the oral argument, that the plaintiff's character for chastity was undisputed. On the other hand, it appears that the state of plaintiff's character in that respect was an issue sharply drawn, and the evidence relative thereto quite evenly balanced. It may be that if defendant had been allowed, he could have brought about a clear preponderance in his favor.

Again, it may be said here, as in Green v. Ins. Co., *supra*, "If the power of the trial court to limit the number of witnesses, as here exercised, existed, which can not be conceded, it should have been done at the beginning of the trial, so as to give each party an opportunity of selecting such witnesses as might be deemed most important. This would have the

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merit, at least, of placing the parties on an equal footing. By the course pursued, the complainant was practically deprived of this privilege." There appears to have been no rule of court adopted and published in relation to the number of witnesses. The defendant then had no notice that he was to be so limited, and did not then have an opportunity to select his three witnesses; but, as already stated, defendant had but one witness, of his own choosing, in relation to the issue of plaintiff's character.

In our opinion then, the exclusion of the testimony offered was error prejudicial to defendant, and must work a reversal. The judgment will be reversed and cause remanded. All concur.

HENRY KROEGER, Plaintiff in Error, v. TOM DASH, Defendant in Error.

Kansas City Court of Appeals, January 8, 1900.

Appellate Practice: GRANTING NEW TRIAL: APPEAL V. WRIT OF ERROR. A writ of error does not lie to review the action of the trial court in ganting a new trial though an appeal does. Cases considered and distinguished.

Error to the Cole Circuit Court.—*Hon. D. W. Shackelford*, Judge.

WRIT DISMISSED.

Edwards & Edwards for plaintiff in error.

(1) Does a writ of error lie from the order granting a new trial or must it be by appeal? If this court or the supreme court have passed upon this first question directly, we are not aware of it, but it has construed a similar statute, to wit, section 2253, of the Revised Statutes 1889, and the reason in

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that case well applies here. Ring v. Railway, 112 Mo. 220. (2) Having appeared to the merits it is now too late to object to the manner of getting into court. Crosby v. Clary, 43 Mo. App. 222, and authorities cited.

Pope & Belch for defendant in error.

Prior to the amendment to section 2246, Revised Statutes 1889, approved April 18, 1891, p. 70, neither appeal nor writ of error would lie from an order granting a new trial. Since then an appeal only will lie, because authority for such was granted by that act. Our position is that the writ of error sued out in this case should be dismissed. Writs of errors should issue upon final judgment only. Revised Statutes 1889, section 2273; Martin v. Hays, 5 Mo. 62; Horr v. Knighton, 9 Mo. 180; Young v. Hudson, 99 Mo. 102; Duncan v. Forgey, 25 Mo. App. 310; Wirt v. Dinan, 41 Mo. App. 236; Ready v. Smith, 141 Mo. 305.

ELLISON, J.—This is an action of replevin. On a trial in the circuit court there was a verdict for the plaintiff. Afterwards defendant filed a motion for new trial which being sustained, the verdict was set aside and a new trial granted. Plaintiff did not appeal, but afterwards sued out a writ of error in this court and brought the case here by such writ of error. The question is presented, whether a writ of error can be had on a judgment granting a new trial.

By the terms of section 2246, Revised Statutes 1889, an appeal could only be taken from the final judgment in a case. And by the terms of section 2273, writs of error could only be issued to review a final judgment. By the laws of 1891, amended by the laws of 1895, section 2246 was amended so as to allow an appeal from an order granting a new trial. But section 2273 stands unamended, and writs of error can still only issue in cases of final judgment. It has all

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along been held that an order granting a new trial was not a final judgment. So therefore, on the face of the statute plaintiff is not entitled to a writ of error to review the action of the trial court in granting a new trial.

But plaintiff argues that the lawmaking power evidently intended to grant the right by writ of error along with the right of appeal. There is no evidence of such intention. The intention appears to be to restrict the right to an appeal; for the appeal section is amended by name and the writ of error section is left as it was. There may be many reasons suggested why an appeal may be, and a writ of error may not be had: A writ of error is a new and independent action (Macklin v. Allenberg, 100 Mo. 337) and it may be issued at any time within three years, and might thus evidently embarrass the procedure in cases which had been arrested by the granting of a new trial. The cases of Young v. Hudson, 99 Mo. 102, and Duncan v. Forgey, 25 Mo. App. 310, bear resemblance to this and we consider them authority for our position.

The supreme court has decided that writs of error may be taken and heard on what is known as the short form— a certificate of judgment and date of entry, etc., under section 2253, Revised Statutes 1889; Ring v. Railway, 112 Mo. 220. But that case does not justify the conclusion plaintiff draws from it. That case is based on the terms of the statute itself which plainly show that a writ of error was intended to be included with the right of appeal. And so the same may be said of State ex rel. v. Railway, 149 Mo. 104.

It follows that plaintiff had no right to a writ of error for review of the action of the trial court in granting a new trial and the writ will be dismissed. All concur.

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W. R. RATCLIFF, Appellant, v. LOUIS LUMPEE, Ex'r, Respondent.

Kansas City Court of Appeals, January 8, 1900.

1. **Quantum Meruit:** PRESUMPTION: FAMILY RELATION: APPELLATE PRACTICE. Ordinarily one is presumed to agree to pay for services performed by another, but such presumption does not obtain between members of a family, and there can be no recovery unless the one intended to charge and the other to pay. And where such issues are submitted on sufficient evidence with correct instructions, the verdict is conclusive on the appellate court unless there is manifest prejudice, passion or corruption on the part of the jury.

2. **Estoppel:** EXECUTOR'S PAYMENT OF NOTES AT THE REQUEST OF THE PRINCIPAL: ALLOWANCE. One can not repudiate a state of things brought about by his own instigation and request; so where an executor at the request of the principal pays a note on which his testator was surety, such principal can not escape indemnifying on the ground that said note had not been presented to and allowed by the probate court.

Appeal from the Morgan Circuit Court.—*Hon. D. W. Shackleford*, Judge.

AFFIRMED.

William Forman for appellant.

(1) The verdict was against the weight of the evidence and against the law under the evidence. And can only be accounted for on the ground that it was the result of passion or prejudice. "Where the preponderance of the evidence against the verdict in an action at law is so strong as to raise a presumption of prejudice, passion, corruption, gross ignorance or partiality on the part of the jury, a new trial will be granted on appeal." Oldham v. Henderson, 4 Mo. 295; Baker v. Stonebraker, 36 Mo. 338; Friesz v. Fallon, 24 Mo. App.

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439; Spohn v. Railway, 87 Mo. 74; Lionberger v. Pohlman, 16 Mo. App. 392; Borgraefe v. Knights of Honor, 22 Mo. App. 127; Empey v. Cable Co., 45 Mo. App. 422; Walton v. Railway, 49 Mo. App. 620; Lovell v. Davis, 52 Mo. App. 342; Reisert v. Williams, 51 Mo. App. 13; Boggess v. Railway, 118 Mo. 328. (2) The notes mentioned in the counterclaim and offered in evidence had never been allowed as demands against the estate of Simon Ratcliff by the probate court or any other court; but were paid by the executor without legal authority. The executor could not in a settlement take credit for the amount paid by him therefor, hence the appellant was not indebted to the estate for the sum so paid by the executor without authority of law. R. S. 1889, sec. 137, 188, 191, 196 and 199; Wernse v. McPike, 100 Mo. 476; Burton v. Rutherford, 49 Mo. 258.

Moore & Williams for respondent.

(1) The trial court having admitted all evidence tending in the remotest degree to show any service rendered by the plaintiff; and having given the instructions asked, the plaintiff has now no reason to complain. Under the favorable instructions of the court, the whole question as to the evidence was one for the jury. The contention having been decided advesely to plaintiff, this court will not interfere. Blanton v. Dold, 109 Mo. 64; College v. Borck, 44 Mo. App. 19; Watson v. Stromberg, 46 Mo. App. 630. (2) The plaintiff having requested defendant as the executor of his father's will to pay off these notes, is now estopped from claiming that they were paid without being allowed by the probate court. "It it is a well-settled principle of equity that one who makes representations upon which he expects another to act, and upon which such other relies and is induced to act to his detriment, will not afterward be heard to question the truth of what was represented to the one who had been induced thereby to change his condition." Bank v. Frame, 112 Mo.

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513; Chouteau v. Goddin, 39 Mo. 229; Garnhart v. Finney, 40 Mo. 449; Schenck v. Sautter, 73 Mo. 46; Moore v. Bank, 52 Mo. 377; Lumber Co. v. Kreeger, 52 Mo. App. 419; Lackland v. Stevenson, 54 Mo. 108; Gray v. Gray, 83 Mo. 106; Wilcox v. Howell, 44 N. Y. 402; Canal Co. v. Hathaway, 8 Wend. 483; 11 Am. and Eng. Ency. of Law, sec. 42.

GILL, J.—This is a suit brought by the son against his father's estate, whereby the plaintiff seeks to recover the value of certain alleged services performed for his father during the last fifteen years of the latter's life. The petition, in effect, alleges that the plaintiff was employed by his father to take charge of and do the necessary work on the latter's farm and to furnish board, with the understanding that he, the plaintiff, should be paid a reasonable compensation therefor. That plaintiff did the work, boarded the old gentleman and his farm hands, cared for him in his sickness etc., all of the reasonable value of $100 a year, or $1,500 for the entire time. Some small credits amounting, in the aggregate, to $38.50 were given and judgment asked for a balance of $1,461.50.

In addition to a general denial, and some defenses not necessary to mention, the answer set up that the plaintiff lived in the immediate neighborhood of his father and that if he did perform any services for his said father they were merely gratuitous and on account of the relationship existing and as a return for benefits received from his said father, and that there was no intention or understanding between the parties that any charges should be made therefor. Defendant's executor further alleged, by way of counterclaim, that at the plaintiff's request he (as executor) paid off and satisfied two past due notes of the aggregate sum of $152, which had been executed by plaintiff, with said Simon Ratcliff as surety, and for this sum defendant asked judgment against the plaintiff. To the new matters alleged in the answer plaintiff filed a reply, putting the same in issue.

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There was a trial by jury, resulting in the defeat of the plaintiff on the main issue, and a further finding and judgment for defendant on the counterclaim, and plaintiff appealed.

I. In regard to the cause of action set out in plaintiff's petition—that is, as to the plaintiff's right of recovery for alleged services performed for his father during the last fifteen years of the latter's life, it is sufficient to say, that the issues were fairly submitted to the jury, on conflicting evidence, and on instructions prepared and offered by plaintiff's counsel, and the plaintiff therefore has no cause whatever to complain. At plaintiff's request the court told the jury, in substance, that ordinarily an obligation to pay for services performed by one for another is presumed, but that a presumption may arise from the relationship of the parties that the services were acts of gratuitous kindness, etc. And the jury were further instructed that if they found plaintiff rendered the services at the request of his father "and that he (plaintiff) intended, while rendering such services, to charge the father, and that the father intended to compensate him for the same, then you will find for the plaintiff," etc. The jury by their verdict have found that, even if services were performed by the plaintiff for the father, yet they were mere acts of gratuitous kindness and were not intended to be charged for. This must end the claim as set out in plaintiff's petition. The jury's finding on that matter is conclusive on us.

It is useless to claim that the verdict is against the weight of the evidence. This court will not ordinarily in law cases attempt to determine where the preponderance of the evidence lies. This duty devolves on the jury trying the case, subject to the supervising control and corrective power of the trial judge. It is only where the preponderance of the evidence is so overwhelming and manifestly against the verdict as necessarily to imply prejudice, passion or corruption on the part of the jury, that this court will interfere. A careful reading of this record discloses no such case. Other than that, the

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verdict is well supported by the evidence. The testimony, viewed in the light of the circumstances, tends strongly to sustain the jury's finding that whatever services this plaintiff may have performed for his father during his life time were given as a free offering to filial affection, and that there was no intention at the time of the one to give or the other to receive any pecuniary reward therefor.

II. As to the matter of counterclaim, the undisputed facts make a clear case for the defendant. It is conceded by the record that during the life of plaintiff's father, he, the plaintiff, gave two notes on which his father placed his name as surety. They were not paid, and after the father's death, the executor, on plaintiff's request, paid the notes—the plaintiff at the time agreeing to recompense the defendant, as executor, out of the plaintiff's share in the estate. Notwithstanding this, plaintiff now insists that the defendant executor has no claim against the plaintiff because of the payment of these notes. It is contended that the executor was not authorized to pay the notes until they had been presented to the probate court and allowed. But plaintiff is estopped from taking any such position, for it was at his request that the executor adopted this course. He can not repudiate a state of things brought about by his own instigation and request.

On the facts found by the jury, the judgment is manifestly for the right party and will be affirmed. All concur.

R. P. STONE, Respondent, v. HENRY BAER, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Justices' Courts: APPEALS: NOTICE. Notice of appeal signed by J. Henry Baer is insufficient when the judgment is against Henry Baer.**

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2. **Bills of Exceptions: OFFER OF EVIDENCE: COPYING IN THE RECORD. Where the bill of exceptions shows that certain evidence was offered but fails to show its admission, it does not become a part of the record and can not be considered by the appellate court although copied in the transcript.**

Appeal from the Moniteau Circuit Court.—*Hon. D. W. Shackleford*, Judge.

AFFIRMED.

Moore & Williams for appellant.

(1) The notice of the appeal was acknowledged by plaintiff's attorneys, who filed the statement or complaint for plaintiff with the justice. This notice of appeal, with acknowledgment of service of notice by plaintiff's attorneys, was a full compliance with section 6342, Revised Statutes after which, plaintiff was in court for all purposes. Litigants are bound by the action of their attorneys of record. State to use v. Hawkins, 28 Mo. 372; Ring v. Vogel, 46 Mo. App. 374; McDonough v. Daly, 3 Mo. App. 606. (2) Then, after the case had been appealed to the Cole circuit court, and when notice was given plaintiff's attorneys, that application would be made for a change of the venue of said cause, said attorneys indorsed on said notice, "Service of the above notice is hereby acknowledged this 15th day of November, 1898, and all formalities are hereby waived."

Edwards & Edwards for respondent.

(1) The notice is given in a suit between R. P. Stone against Henry Baer. It is signed "J. Henry Baer," which is no notice under the numerous decisions of this court and of the supreme court. Tiffin v. Millington, 3 Mo. 418; Cella v. Schnairs, 42 Mo. App. 316; McGinnis v. Taylor, 22 Mo. App. 513; Drug Co. v. Hill, 61 Mo. App. 680; Hammond v. Kroff, 36 Mo. App. 118. (2) In support of the motion to dismiss

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we refer the court to certified copy of the bill of exceptions filed herewith in which there is no transcript of the Cole circuit court copied, nor directions to the clerk to copy it, and the clerk's copying it in the transcript does not make it a part of the record in this cause. Roberts v. Bartlett, 26 Mo. App. 611; McNeil v. Ins. Co., 30 Mo. App. 306; Martin v. LaMaster, 63 Mo. App. 342; State v. Batchelor, 15 Mo. 208; In re Webster, 36 Mo. App. 355; Ryan v. Growney, 125 Mo. 474; Turley v. Barnes, 131 Mo. 548.

GILL, J.—In August, 1898, plaintiff recovered a judgment of $50 against defendant before a justice of the peace of Cole county. Within ten days thereafter, but not on the day the judgment was rendered before the justice, the defendant appealed to the circuit court of Cole county. At the following November term of that court the defendant applied for and secured a change of venue to the Moniteau circuit court. At the January (1899) term of that court, plaintiff filed a motion asking that the judgment of the justice be affirmed on the alleged ground that defendant had failed to give the notice of appeal required by the statute. This motion was sustained and the defendant appealed to this court.

I. The question is, whether or not such notice of appeal from the justice as section 6342 requires was given by the defendant? A notice was given, but it is contended that it was not a notice from the defendant named in the judgment. The judgment of the justice was rendered against Henry Baer while the notice served on plaintiff's counsel was signed "J. Henry Baer." In other words, J. Henry Baer gave notice that he had appealed from a judgment rendered against Henry Baer. And whether or not these parties are the same does not appear.

Under the former decisions of the supreme court, and of this court as well, we must sustain the action of the trial court.

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The notice does not meet the technical accuracy required. Tiffin v. Millington, 3 Mo. 418; McGinniss v. Taylor, 22 Mo. App. 513; Hammond v. Kroff, 36 Mo. App. 118; Cella v. Schnairs, 42 Mo. App. 316; Drug Co. v. Hill, 61 Mo. App. 680. These cases are decisive against the sufficiency of the notice. In the Taylor case above cited the judgment of the justice was against J. J. Taylor while the notice of appeal was signed C. C. Taylor, and it was held insufficient. There has been a strictness in reference to these notices bordering on the unreasonable, but we feel bound to follow the rule as declared.

Counsel for defendant, however, have insisted that plaintiff waived the imperfection in the notice of appeal by an appearance in the matter of defendant's motion for change of venue. That matter however is no part of the record here because not incorporated in the bill of exceptions. The bill of exceptions, as signed by the judge, contains no reference thereto except this: "The defendant offered the entire transcript from the Cole county circuit court, to which plaintiff objected as incompetent on this hearing." Nothing further is said about it. It does not appear whether the court admitted such matter or any part thereof. Nor was such matter, or any part thereof, set out in the bill of exceptions, or even referred to with instructions to the clerk to copy the same. It is clear then that we must disregard such matter copied in the abstract, because wanting in legal authenticity. It could only become a part of the record by the certificate of the judge; the clerk had no right to copy the same into the transcript. "Judicial records are made by order of the court, and not by order of counsel, or by the voluntary actions of the clerk." McNeil v. Ins. Co., 30 Mo. App. 307 and cases cited; Martin v. Nichols Est., 63 Mo. App. 342.

The judgment of the Moniteau circuit court must be affirmed. All concur.

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THE STATE OF MISSOURI ex rel., SCHOOL DISTRICT NO. 3, TOWNSHIP 44, RANGE 16, Appellant, v. C. W. BURFORD, County Clerk, etc., Respondent. 82 343 84 665

Kansas City Court of Appeals, January 8, 1900.

1. **Schools: FORMATION OF NEW DISTRICT: RIGHT OF APPEAL. Where on an application to form a new district by detaching certain sections of land from each of two districts, both districts vote against the proposition, but a majority of the voters affected by the change in one of the districts voted in favor of such new district, an appeal lies to the commissioner whose decision is final.**
2. **———: LEVYING TAXES: DUTY OF COUNTY CLERK: JUDGMENT OF COMMISSIONER. The county clerk is required to assess the amount of estimates returned to him by a district on the taxable property therein, and he can not assess one district with the estimates of another, nor can he ignore the decision of the commissioner forming a new district.**
3. **———: NEW DISTRICT: MEETING OF VOTERS. The fact that the qualified voters of a new district did not meet within fifteen days after the decision of the commissioner will not destroy such new district; and, until the districts affected by the formation of the new district have notice of the commissioner's decision establishing the same, such new district is not formed and a meeting within fifteen days of such notice is sufficient under the statute.**
4. **———: ORGANIZATION OF NEW DISTRICT: PLAT. Where the voters of a new district meet, make their estimates, etc., the failure to adopt a plat can not have the effect to render nugatory the action of the commissioner in forming a new district.**

Appeal from the Moniteau Circuit Court.—*Hon. D. W Shackleford*, Judge.

AFFIRMED.

Moore & Williams for appellant.

(1) Mandamus was the proper remedy in this case to compel the county clerk to recognize the limits of the old

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district. State ex. rel. v. Byers, 67 Mo. 706; State ex rel. v. Riley, 85 Mo. 156; State ex rel. v. Grimshaw, 5 W. Rep. 427. (2) The school commissioner had no authority to act, except when the question of the formation of a new district was submitted to the voters in each district, and in case the vote of the district was adverse to the change, then the proposition must be submitted to and be voted upon, by the portion of the district to be affected by the change, which vote must be opposite to the vote of the district. R. S. 1889, sec. 7972; State ex rel. v. Grimshaw, *supra*. (3) The meeting of the electors of the proposed new district on May 17, 1899, twenty days after the decision of the commissioner, was nugatory and void. School District v. Wallace, 75 Mo. App. 317.

R. M. Embry for respondent.

(1) Relator must establish clearly his right to the protection he asks, as the writ is never granted in doubtful cases. (2) The decision of the commissioner in cases of this nature is final. State ex rel. v. Gibson, 78 Mo. App. 170. (3) The argument of the relator is, that because a separate vote was not taken in each of the parts effected, in each of the two original districts, the appeal to the commissioner gave the commissioner no authority or jurisdiction to act in the premises. This position is untenable. One part of a district votes favorable to creation of a new district, the remainder of same district votes against it, and the other district votes against it, this would give the commissioner jurisdiction on appeal to him. R. S. 1889, sec. 7972. (4) When the commissioner obtains jurisdiction under provisions of Revised Statutes 1889, section 7972, as he did in this case, and renders his decision establishing a new district, the district is formed, established, and a corporate body from the date of the decision of the commissioner, such decision establishing the boundary lines and forming the new district, the same as if it had been established by a majority

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vote of the district and all parts thereof effected. R. S. 1889, sec. 7972; School District v. School District, 94 Mo. 612; State ex rel. v. Eden, 54 Mo. App. 31. (5) The resident voters in the new district assembled and organized on the seventeenth day of May, 1899. This was substantial compliance with the statute. This is within the statute and sufficient. State ex rel. v. Eden, 54 Mo. App. 31; St. Louis County Court v. Sparks, 10 Mo. 119; 23 Am. and Eng. Ency. of Law, 458.

SMITH, P. J.—This is a proceeding by mandamus to compel the respondent, who is county clerk of Moniteau county, to assess the amount of the estimate returned by relator on all taxable property, real and personal, within certain territorial limits. The pleadings are not presented by the abstract and it is not quite clear just what the issues in the case were. There seems to have been a trial in the court below which resulted in a judgment dismissing the writ. The relator has appealed.

The facts of the case were embraced in a stipulation, which was to the effect: "The parties hereto agree on the following statement of facts, on which this cause is submitted:

"School districts 2 and 3—44—16 in Moniteau county, have existed for several years, as stated in plaintiff's petition. Prior to the annual school meeting in April, 1899, petitions were duly presented to the clerks of both districts, asking a vote on the formation of a new district, by detaching sections 13 and 14 from district No. 2, and detaching sections 23 and 24 from district No. 3. Said four sections to form a new district; that the proposition was voted down in both districts, voting as a whole; but a separate vote was taken, in that part of district No. 2 affected—persons living in sections 13 and 14—and a majority of such persons voted in favor of the change. That within five days after the election, a lawful number of the voters in district No. 2, appealed to the county school commissioner; that said commissioner assumed to have

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authority to hear and entertain such appeal, and on April 29, 1899, returned a decision in favor of the formation of the new district; and on that day transmitted his decision to the district clerks of both districts, which was received by the clerk of district No. 3 on same day, and by the clerk of district No. 2 on May 2, 1899. "That thereupon, a notice was duly posted signed by two electors of the proposed new district, calling a meeting therein for May 17, 1899, which notice was as follows:

"NOTICE OF SPECIAL SCHOOL MEETING.

"Notice is hereby given according to law, to the qualified voters of new district, township No. 44, range No. 16, county of Moniteau, state of Missouri, that a special school meeting of said sub-district will be held at M. B. Sugg's on Wednesday the 17th day of May, 1899, at 2 o'clock p. m. The said meeting is called for the following purposes, viz.:

"To organize district by electing three directors.

"To vote site for location for schoolhouse.

"Dated this 2d day of May, 1899.

W. F. Hill, J. H. Hays, W. T. Scott.

"That a meeting was held in accordance with the notice, May 17th, at which Messrs. Hill, Hays and Wright were elected directors; that same directors qualified and appointed one Rolin Hill clerk, who, by order of said directors, filed with defendant, as clerk, a plat of the district, and also a list of taxpayers, and enumeration of children therein; that at the meeting on May 17th, no vote was taken to adopt a plat defining the boundaries of the proposed new district."

It is contended by the relator that the facts agreed show that there could be no appeal to the school commissioner, and therefore he was without jurisdiction to create the new district. Section 7972 Revised Statutes 1889, provides: "When it is deemed necessary to form a new district, composed of

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two or more entire districts, or parts of two or more districts or to divide one district to form two new districts from the territory therein, or to change the boundary lines of two or more districts, it shall be the duty of the district clerk of each district affected, upon the reception of a petition desiring such change, and signed by ten qualified voters residing in any district affected thereby, to post a notice of such desired change in at least five public places in each district interested fifteen days prior to the time of the annual meeting; and the voters, when assembled, shall decide such question by a majority vote of those who vote upon such proposition. If the assent to such change be given by all the annual meetings of the various districts thus voting, or of the parts of a district to be divided, each part voting separately, the district or districts shall be deemed formed or the boundary lines thus changed from that date; but if a part of a district to be divided, or one or more of the districts affected, vote in favor of such change, and the remaining part of the district to be divided, or one or more of the districts affected, vote against such change, the matter may be referred to the county commissioner for his decision; and upon such appeal being filed with him in writing within five days after the annual meeting, he shall proceed to inform himself as to the necessity of such proposed change, and his decision shall be final," etc.

It is thus seen that if a part of a district to be divided vote in favor of the change, and the remaining part, or one or more of the districts affected, vote against such change, the matter may be taken before the county commissioner by appeal for his decision. The facts agreed show that the qualified voters residing in sections 13 and 14 of district No. 2, the part thereof to be divided, voted separately in favor of the change; and that districts No. 2 and 3 voted against it. This established such a conflict as authorized an appeal to the county commissioner. The appeal, under such conditions,

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invested him with jurisdiction of the subject-matter. Having acquired jurisdiction, the statute makes his decision final. He made the change in conformity to the proposition contained in the notices voted upon at the annual meeting.

We do not think with relator that because a majority of the qualified voters in the part of district No. 3 to be detached did not vote—voting separately—against such change that there could be no appeal. If, as is conceded to have been the case, the qualified voters of a part of one of the districts voting separately, voted for the change, and either one or both of the two districts voted against it, that then, according to our interpretation of the statute, the matter of difference was such as authorized an appeal. It is our conclusion that the change made by the judgment and decision of the commissioner had the effect to create the new district. That this new district thus created is as legal as if it had been created by the action of the majority of the qualified voters of each of the districts voting at the annual meetings. The judgment and decision of the commissioner could have no other effect than to accomplish the complete separation of sections 13, 14, 23 and 24 from districts 2 and 3. These sections were thereafter no part of the old districts from which they were subtracted.

It is quite difficult to understand after the subtraction of these sections from said districts, how the respondent could assess the estimates of the latter against the real and personal property in the former. The clerk is required by the provisions of section 8067 Revised Statutes 1889, to assess the amount of the estimates returned to him by the districts on all taxable property, real and personal, therein. He is without power to assess the property of one district with the amount of the estimate of another. He can no more ignore the judgment and decision of the commissioner in respect to the creation of a new district than he could in a case where a district is created by the decision of the qualified voters of one or

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more districts voting at an election. To have ignored the action of the commissioner in forming the new district would have been the assumption by him of a power without any warrant of law.

We are not prepared to concede that even if the qualified voters did not meet within fifteen days after the decision of the commissioner that this authorized the respondent to ignore the existence of the new district established by the act of the commissioner. It is, no doubt, true that the corporate school district entity, within the territorial limits of the new district, could have no existence until the requirements of the provisions of section 7977 were substantially complied with. The decision of the commissioner was made on the twenty-ninth day of April, but notice of his decision was not given to the clerks of the districts until May 2. The meeting in the new district was not held until the seventeenth of May. The meeting was not held within fifteen days after the date of the decision, but was held within fifteen days after the service of notice of the rendition of the decision. The statute is that, the meeting shall be held within fifteen days after the "formation" of the new district by the judgment and decision of the commissioner. Statutes like this should be construed with reasonable liberality. Until the districts to be affected by the action of the commissioner have notice thereof, it can hardly be said that the new district is formed. The decision of an officer or tribunal can hardly be said to be operative and effective until in some way promulgated or made known. Certainly the districts are not held to constructive notice of the action of the commissioner, for if so why is he required by the statute to give them notice of his action? The notice was, we think, sufficient, and the organization of the district ought not now to be questioned.

The district meeting made its estimate for the school year and returned the same to the respondent, who has assessed the amount thereof on the real and personal property therein

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—which assessment, we may presume, has been collected. We do not think the failure at the meeting of the voters of the new district to adopt a plat had the effect to render nugatory the action of the commissioner in forming the new district.

In any view which we have been able to take of the case, we think the action of the trial court in refusing the relator's peremptory instruction was proper, and it results that the judgment must be affirmed. All concur.

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82 350 J. S. JOHNSON, Ex'r, Etc., Respondent, v. MARY E.
f82 440 JOHNSON, Appellant.

Kansas City Court of Appeals, January 8, 1900.

Administration: DISCOVERY OF ASSETS: PROBATE COURT: CIRCUIT COURT. In a proceeding by an executor to discover assets neither the probate court nor the circuit court on appeal can finally determine the rights of property between *anob fide* disputants, as the good faith of the party in possession of the assets is the sole question to be tried in such proceeding.

Appeal from the Maries Circuit Court.—*Hon. D. W. Shackleford*, Judge.

REVERSED.

J. B. Harrison for appellant.

(1) There was no authority of the probate court to proceed further after the defendant had testified under oath in the probate court in answer to the complaint and affidavit, and especially after interrogatories had been filed, and answers to interrogatories filed, said notes showing on their face that she was entitled to the possession of said notes as her sole and

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separate property. If the executor desired to prosecute the said proceedings further, he should have denied said answers and stated wherein they were false and untrue. In re Est. Stuart, 67 Mo. App. 61; Gordon v. Eans, 97 Mo. 587; Hook v. Dyer, 47 Mo. 214.

W. S. Pope for respondent.

The appellant could not claim both dower and also by survivorship; and having taken dower she can not take these notes. R. S. 1889, sec. 4531; Roberts v. Walker, 82 Mo. 200; Arnold v. Willis, 128 Mo. 145.

ELLISON, J.—This is a proceeding begun in the probate court under the provisions of sections 74, 75, 76 and 77, Revised Statutes 1889, by the executor of the will of Phillip Johnson to discover assets alleged to belong to the estate, and which the executor charges defendant (widow of the testator) with "concealing" and withholding from him as such executor. The defendant was cited to appear in the probate court, where she was examined on oath, orally, in which she specifically set forth the several items of property in dispute, but which she alleged were her own and did not belong to the estate. The plaintiff executor then filed his interrogatories, as is provided by the statute aforesaid, and defendant answered these, making claim to the property as her own. The probate court found for her, and the executor appealed to the circuit court where judgment was for the plaintiff, and defendant has come here for relief.

It seems that on the foundation of a simple summary statutory proceeding to compel the surrender of property "embezzled, concealed or otherwise wrongfully" withheld, there has been built a law suit of considerable proportions, involving intricate questions as to the property rights of married

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women, by statute and common law, including a variety of questions on the right of survivorship.

The charge here is, that defendant had "concealed" various articles of property, when there is no evidence whatever of any concealment. The defendant claimed the property as hers. The evidence shows the claim was made in the honest belief that it was supported by both conscience and law. The circuit court had no authority to try the absolute right to the property in dispute. Its duty could go no further than that derived from the probate court, from which it received the case by appeal, and that court, in cases like this, can only try the question of the good faith of the claim of property which may be made. The proceeding was not intended to finally determine the rights of property between *bona fide* disputants. That should be done in another forum and in a more formal way. Gordon v. Eans, 97 Mo. 605. Where, as here, the claim to the property is not an afterthought or pretense, but made openly in the honest belief of right of property, the finding should be for the party charged; when, if it be deemed expedient, a proper remedy may be sought to test the title in other places.

As there was a total failure to make out a case under the statute aforesaid, the judgment will be reversed and judgment entered for the defendant. All concur.

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C. F. MUSSEY, Respondent, v. C. H. VANSTONE, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Attorney and Client: COLLECTING AGENCY: INSTRUCTION.** Where an attorney brings suit on a claim as the attorney of a collection agency, he can not recover his fees from the plaintiff in such proceeding; and an instruction set out in the opinion is held proper under the pleadings and evidence in this case.

2. **Trial Practice: COURT AS JURY: INSTRUCTION.** Where the court sits as a jury, the parties are entitled to have declarations of law, and the court's rulings in this regard are subject to review.

Appeal from the Saline Circuit Court.—*Hon. Richard Field*, Judge.

REVERSED AND REMANDED.

L. W. Scott for appellant.

(1) The court erred in refusing to give the declaration of law prayed for by the defendant. This defense was testified to by defendant Vanstone and his evidence is supported by the written contract he had with the Bristol Mercantile Agency, offered in evidence, and by the letter of the agency to defendant, written prior to defendant's connection with plaintiff, in which is found this language: "Our attorney is Charles F. Mussey, No. 515 Main street, a hustler, you can write him too;" and by the letter of C. F. Mussey to C. H. Vanstone of date of June 10, 1895, written after the services had been performed in which is this language: "You are right in assuming that we are working under your contract with the Bristol Mercantile Agency," and by other evidence. (2) The defendant was entitled to a declaration of law on his theory of the case, predicated as it was upon the pleadings and evidence in

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the case. Cunningham v. Snow, 82 Mo. 587, 593; Lee v. Potter, 18 Mo. App. 377; Butler Co. v. Bank, 143 Mo. 13. (3) The Bristol Mercantile Agency was defendant's agent for the collection of these claims. There was no privative of contract between Mussey and Vanstone, and Mussey could not maintain an action against Vanstone on the contract. Hill v. Morris, 15 Mo. App. 322; Homan v. Ins. Co., 7 Mo. App. 32; Trafton v. United States, 4 Story 653; Hoover v. Wise, 91 U. S. 311; Corbett v. Shumacker, 83 Ill. 403.

Harvey & Gower for respondent.

The court committed no error in refusing to give declaration of law numbered one in behalf of defendant for the reason that defendant's own testimony shows clearly that he employed plaintiff to institute the suits and conduct the litigation in question for him. Wilkerson v. Eilers, 114 Mo. 245; McCarthy v. Fagin, 42 Mo. App. 619.

GILL, J.—This is an action in two counts. In the first, plaintiff alleges that he was employed by defendant to institute and prosecute as an attorney two suits in the circuit court of Jackson county, and that his services were reasonably worth the sum of $150. The second count is for the recovery of $1080, being a balance due for advanced costs in said two suits, paid by plaintiff at defendant's request.

The answer is first a general denial, and secondly, as a further answer, defendant says, "that on or about the 3d day of August, 1893, he entered into a written contract with the Bristol Mercantile Agency, a corporation located in the city of Chicago, state of Illinois, whereby said agency, for and in consideration of $30 to it paid by defendant, agreed to endeavor to make collections for defendant anywhere in the United States or Canada, of any claims that might be put in its hands, upon the rates and terms that if no collection was

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made no charge would be made, and that it would only charge a certain stated per cent on the collections that were made. That under this contract he sent the notes and accounts mentioned in plaintiff's petition to said agency for collection, and the said agency forwarded the same to the plaintiff in Kansas City as its agent or attorney, and the plaintiff as its agent or attorney for the Bristol Mercantile Agency brought the suits mentioned in his petition against the said Nancy Bainbridge et al., and recovered two judgments upon which executions were issued, levies made and certain real estate sold, but the property only brought a nominal sum. That under defendant's contract with the Bristol Mercantile Agency it was not entitled to any pay for its services for attorneys' fees or otherwise. The plaintiff in bringing the suits was not acting as attorney for defendant, but was attorney for the Bristol Mercantile Agency and the defendant owes him nothing."

The reply was a general denial of the new matter set up in the answer. The issues were tried by the court, sitting as a jury, resulting in a finding and judgment for plaintiff, and defendant appealed.

I. The principal complaint relates to the court's action in refusing the following declaration of law asked by defendant: "If the court sitting as a jury believe from the evidence that defendant Vanstone, entered into a written contract with the Bristol Mercantile Agency whereby said Agency contracted and agreed to endeavor to collect such claims as defendants might put into their hands, anywhere in the United States or Canada for a certain per cent named in said contract, and that said Vanstone forwarded the notes and accounts mentioned by plaintiff in his petition, to such agency for collection under said agreement, and that said notes and accounts were sent by said agency to the plaintiff as its attorney, and that the plaintiff undertook to collect said notes and accounts as attorney for such agency and brought the suits mentioned

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by him as the employee of such agency, then he can not recover in this suit against this defendant."

The refusal of this declaration of law was manifest error. It was clearly within range of the answer, and there was abundant evidence tending to prove the facts therein recited. The main issue was, whether or not plaintiff took charge of the collections and instituted the suits in Jackson county under a direct employment by the defendant, or whether in so doing the plaintiff was acting as a mere sub-agent, attorney or employee of the Bristol Mercantile Agency with whom the defendant had a contract for the collection of the claims. If the latter hypothesis was the true one then the defendant was bound to respond to the Bristol Agency and not to plaintiff, its servant and employee. Hill v. Morris, 15 Mo. App. 322, and cases cited. The court however seems to have treated this as an immaterial matter and that it made no difference whether plaintiff, in making the collections and conducting the suits against the Kansas City parties, was so doing as the employee or attorney of defendant or of the Mercantile Agency.

II. The defendant was entitled to have the trial judge declare the theory of law upon which he decided the case, and his rulings on declarations of law are subject to review in the appellate court. Butler Co. v. Bank, 143 Mo. 13.

The judgment must be reversed and cause remanded. All concur.

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GEORGE VEST BUSH by next friend, Appellant, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, January 8, 1900.

Appellate Practice: ABSTRACT: MOTION FOR NEW TRIAL. The motion for a new trial must show the ruling of the trial court relied upon to reverse the judgment, and the abstract must set out the motion for a new trial before the appellate court will review such ruling.

Appeal from the Saline Circuit Court.—*Hon. Richard Field*, Judge.

AFFIRMED.

Leslie Orear for appellant filed brief on merits.

Wm. S. Shirk for respondent filed brief on merits.

SMITH, P. J.—This is an action which was commenced by plaintiff against the defendant before a justice of the peace to recover certain freight overcharges and for the conversion by defendant of twelve and a half cords of wood. There was a trial in the circuit court which resulted in judgment for defendant. The plaintiff has appealed.

Numerous errors have been assigned here for the reversal of the judgment, but these we are not at liberty to notice, since it does not appear from the abstract of the record before us that all or any of them were incorporated in the motion for a new trial. It has been repeatedly held by the appellate courts of this state that if any ruling of the trial court is intended to be relied on as a ground for reversal of the judgment, such ruling must be made one of the grounds of the motion for a new trial. Such grounds must be incorporated in the mo-

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tion; that it is due the trial court that its attention be called to all matters complained of and which would be relied upon as grounds of reversal, and when this is not done the appellate courts will not consider the propriety of such ruling. McCoy v. Farmer, 65 Mo. 244; Acock v. Acock, 57 Mo. 155; Lancaster v. Ins. Co., 62 Mo. 121; Curtis v. Curtis, 54 Mo. 352; Brady v. Connelly, 52 Mo. 19; Bank v. McMenamy, 35 Mo. App. 198.

It is true the abstract does state that a motion for a new trial was filed and overruled, but it is nowhere intimated what the grounds of the motion were. It would have been just as well if no motion had been filed at all. The bare statement that such motion was filed and overruled will not suffice; the grounds thereof must appear.

It results that the judgment will be affirmed. All concur.

HENRY ROSENTHAL, Respondent, v. W. B. DRAKE, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Real Estate Broker:** DUAL AGENCY: COMMISSIONS. A real estate broker, who without the consent of the parties represents both vendor and vendee, can not recover commissions for the sale.

2. ———: ———: JURY QUESTION: INSTRUCTION: APPELLATE PRACTICE. Whether the broker is the agent of both parties is a question for the jury, and when submitted on proper instruction and evidence the appellate court can not disturb the verdict.

3. ———: AMOUNT OF COMMISSIONS: JURY QUESTION: INSTRUCTION. Where the question of the amount of the broker's commissions is submitted to the jury on proper instruction, the finding is conclusive.

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Appeal from the Johnson Circuit Court.—*Hon. W. W. Wood*, Judge.

AFFIRMED.

Robertson & Caudle for respondent filed an argument citing the following authorities:

Noble v. Blount, 77 Mo. 235; Schooler v. Schooler, 18 Mo. App. 69; Wetzell v. Wagoner, 41 Mo. App. 509; Meade v. Railway, 68 Mo. App. 92; Easley v. Railway, 113 Mo. 236; Burdoin v. Trenton, 116 Mo. 358; Yocum v. Trenton, 20 Mo. App. 489; Reilly v. Railway, 94 Mo. 600; Ridenhour v. Railway, 102 Mo. 270; Dickson v. Railway, 104 Mo. 491; Distilling Co. v. Creath, 45 Mo. App. 169; Bank v. Hatch, 98 Mo. 376; Hughes v. Railway, 127 Mo. 447; Kerr v. Cusenbary, 69 Mo. App. 221; Deweese v. Mining Co., 54 Mo. App. 476; s. c., 128 Mo. 423; Ins. Co. v. Hauck, 83 Mo. 21; Wright v. Brown, 68 Mo. App. 577; Gelatt v. Ridge, 117 Mo. 553 and cases cited; Childs v. Crithfield, 66 Mo. App. 422; Hayden v. Grillo, 35 Mo. App. 647; Zeidler v. Walker, 41 Mo. App. 118; Lemon v. Lloyd, 46 Mo. App. 452; Chipley v. Leathe, 60 Mo. App. 15-21.

O. L. Houts for appellant.

(1) It appeared conclusively from plaintiff's evidence and from all the evidence, that plaintiff in the purchase and sale of defendant's property, was operating and acting as a dual agent, and it nowhere appears that all the parties consented to a double agency. Courts refuse to countenance such an employment, and plaintiff had no right to ask or recover a commission of the defendant. Chapman v. Currie, 51 Mo. App. 40; Lynch v. Fallon, R. I. 311; Rice v. Wood, — Mass. 133. (2) Defendant in conversation with the plaintiff asked $4,000 net and he would pay no commission and would furnish no abstract. Two witnesses besides defendant swore

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positively to this conversation. "Now plaintiff does not attempt to deny the truth of the statements of these witnesses and therefore their statements are to be taken as true as much so as if the plaintiff had made the admission in terms as ruled by this court in criminal cases." Payne v. Railroad, 136 Mo. 562, 594, and cases cited. The undisputed evidence is that the property was sold for $4,000 and no more. The court committed reversible error in giving instructions 2 and 3 upon the part of the plaintiff. Mallmann v. Harris Bros., 65 Mo. App. 127-133; Hohstadt v. Daggs, 50 Mo. App. 240; Carder v. Primm, 60 Mo. App. 423.

GILL, J.—Plaintiff, a real estate agent, recovered judgment for fifty dollars against defendant as commission for sale of a house and lot in Warrensburg, and the defendant appealed.

Points for reversal relate, first, to the court's action in overruling a demurrer to the evidence, and, second, to the instructions given to the jury. A careful consideration of the evidence and instructions, as set out in the abstract, fails to convince us that reversible error was committed. It is first contended that the evidence "conclusively shows" that plaintiff was the agent of the purchaser; and even then though he was employed by the defendant, he will not be allowed to recover a commission from the latter, since said double agency was not with the knowledge and consent of defendant.

The law in relation to this question is well settled. The agent will not be allowed to occupy the double attitude of serving two masters at the same time, except only where the nature of his employment is known and consented to by both principals. Such an engagement is condemned as against a sound public policy. The agent can not faithfully serve the vendor in an effort to secure the highest price for the property offered for sale, and at the same time serve the vendee in

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getting the property at the lowest price obtainable. While being true to one, the agent must necessarily be false to the other. This is the law as laid down in the authorities, some of which are cited by defendant's counsel.

II. But we are not prepared to say that the evidence in this case is all one way, and that beyond dispute the plaintiff was in the employ of the purchaser of the property. The evidence was conflicting in that respect; and in the light of the instructions given, the jury found that no such double agency existed, that plaintiff in the sale of the real estate did not act for the purchaser. The court gave defendant's third instruction which told the jury, "that if they believed from the evidence in this case that in the sale and purchase of the property in question the plaintiff was operating and acting for the purchaser, then he can not recover commission off of the defendant." On the issue thus submitted the jury found against the defendant; and since, as already stated, there was evidence either way, we are not authorized to disturb the judgment on that account.

III. And so further the evidence was conflicting as to whether or not plaintiff's commission was dependent on the fact that the property should sell in excess of $4,000—that defendant's property was to net him the sum of $4,000. This was likewise clearly submitted by defendant's second instruction and the decision of the jury must be treated as final and conclusive.

As to the instructions given, we fail to discover reversible error. They were entirely fair to the defense, and without any conflict declared the law as settled by repeated decisions in this state. The decisive questions were, as stated in defendant's first instruction, whether plaintiff was employed by defendant to sell the property and secondly whether or not the plaintiff "sold the property or was the procuring cause of the sale," etc. In short, the case was fairly tried and the judgment must be affirmed. All concur.

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LYDIA A. COMERFORD, Respondent, v. D. M. COULTER, Ex'r, etc., Appellant.

Kansas City Court of Appeals, January 8, 1900.

Administration: WIDOW'S DOWER: DOMICILE: PERSONAL PROPERTY. A wife, though living in another state, upon the death of her husband domiciled in this state is entitled to four hundred dollars absolute property out of his personal estate, and his domicile is her domicile, and the law of this state governs the distribution of personal property.

Appeal from the Cass Circuit Court.—*Hon. W. W. Wood*, Judge.

AFFIRMED.

Burney & Burney for appellant.

(1) The allowance provided for in section 107 of Revised Statutes 1889, is not "dower" but is in the nature of an exemption. Dobson's Adm'r v. Butler, 17 Mo. 88; Weindel Adm'r v. Weindel, 126 Mo. 640. (2) The exemption laws can not be invoked in favor of nonresidents. Steele v. Leonori, 28 Mo. App. 675; Stotesbury v. Kirtland, 35 Mo. App. 159. The provisions of section 106 and 107, Revised Statutes have no application to nonresident widows. "They are a temporary provision for the widows of deceased persons analogous to the provisions of statutes exempting certain property of debtors from execution. Woerner on Law of Administration [1 Ed.], p. 184, sec. 89; Campbell v. Whitsett, 66 Mo. App. 447; Richardson v. Lewis, 21 Mo. App. 531; Graham v. Stull, 22 S. W. Rep. 738; s. c., 21 L. R. A. 241; Talmadge v. Talmadge, 66 Ala. 199; Ex parte Pearson, 76 Ala. 521; Veile v. Koch, 27 Ill. 129; Barber v. Ellis, 68 Miss. 172; Simpson v. Cureton, 97 N. C. 112; Medley v. Dunlap, 90

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N. C. 527; Coate's Estate, 12 Phila. 171; Spier's App. 26 Pa. St. 233; Odiorne's App. 54 Pa. St. 175; s. c. 93 Am. Dec. 683; 9 Am. and Eng. Ency. of Law [1 Ed.], p. 448; 2 Am. and Eng. Ency. of Law [2 Ed.], p. 158, 159.

Allen Glenn and *Chas. W. Sloan* for respondent.

(1) The widow's rights are fixed "by the fact that she was the wife of decedent at the time of his death." By the husband's domicile, not her residence. 1 Woerner's Am. Law [2 Ed.], sec. 64, p. 131; sec. 89, p. 184; sec. 158, p. 360; 2 Vol. [2 Ed.], sec. 565, p. 1239; R. S. 1889, sec. 261; 5 Am. and Eng. Ency. of Law, p. 869, sec. 3, n. 1; 24 Am. and Eng. Ency. of Law, p. 425, sec. 10; Farris v. Battle, 80 Ga. 187; Mowser v. Mowser, 87 Mo. 439-441; Lewis v. Castello, 17 Mo. App. 593-596; Richardson v. Lewis, 21 Mo. App. 532-534; Austin's Estate, 73 Mo. App. 64-66; Campbell v. Whitsett, 66 Mo. App. 446; King v. King, 64 Mo. App. 302, 303, 304; McPherson v. McPherson, 70 Mo. App. 334, 335; Hastings v. Myers, 21 Mo. 520; Minor v. Cardwell, 37 Mo. 353; Banse v. Muhme, 13 Ohio Cir. Ct. Rep. 501. (2) When the words of the statute are plain, explicit and unequivocal, a court is not warranted in departing from its obvious meaning, by adding to or taking therefrom. R. S. 1889, sec. 6570, clause 1; King v. King, 64 Mo. App. 303; Woodberry v. Berry, 18 Ohio St. 456; Warren v. Barber, 115 Mo. 572; Randol v. Garoute, 78 Mo. App. 611-614; Christian v. Ins. Co., 143 Mo. 464-466;Greismer v. Boyer, 43 Pac. Rep. 17. (3) The allowance provided for in sections 107 and 108 of the Revised Statutes of Missouri for 1889, is a part of the widow's dower, and so designated by our courts. R. S. 1889, secs. 107, 108 and 4517; Cummings v. Cummings, 51 Mo. 263; Norton v. Thompson, 68 Mo. 145-149; Dudley v. Davenport, 85 Mo. 463; Young v. Boardman, 97 Mo. 183-191; In re Klostermann, 6 Mo. App. 315, 316; Schwatken v. Daudt,

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53 Mo. App. 2; Hastings v. Myers, 21 Mo. 520; Dunn v. Bank, 109 Mo. 93-101, clause 3. (4) The evidence does not bear out the claim of a division of property at all. To be in bar of dower the settlement "Must express on its face to be in discharge of dower;" the pretended Iowa settlement does not so express. Perry v. Perryman, 19 Mo. 469; Dudley v. Davenport, 85 Mo. 463; Martien v. Norris, 91 Mo. 465; Farris v. Coleman, 103 Mo. 356-360. (5) John B. Comerford, under section 6856 could have been compelled to support Lydia A. Comerford, his wife. McGrady v. McGrady, 48 Mo. App. 674; Long v. Long, 78 Mo. App. 34-36; Lindenschmidt v. Lindenschmidt, 29 Mo. App. 296; Dwyer v. Dwyer, 26 Mo. App. 648-653.

GILL, J.—This is a suit by a widow to recover from her deceased husband's estate the $400 allowed as her absolute property under our administration law. R. S. 1889, sec. 107. They were an old couple with varied fortune and experiences. They seem to have been married in Ohio, where as husband and wife they resided for five years. They then moved to the state of Illinois, living there together for about twenty-seven years; from there they went to Iowa, and from that state to Nebraska. In the latter state the widow continued to live, but the husband left her and went to Missouri, settling in Cass county, where he died in September, 1896. It seems to that Comerford first deserted his wife in Iowa, but shortly thereafter returned. He abandoned his wife in Nebraska, again returned and cohabited with her for eighteen months, and then, several years before his death, left her again and went to Missouri as above stated. At his death Comerford had considerable personal property at his domicile in Cass county, Missouri, but in his will, executed a few days before his death, he left his wife one dollar only. She renounced the will however and set up a claim to a widow's statutory allowance as before stated.

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In the probate court plaintiff's claim was rejected; but on appeal to the circuit court it was allowed, and the defendant executor appealed.

I. The judgment of the circuit court is for the right party and ought to be affirmed. It is conceded that when Comerford died he and plaintiff occupied the relation of husband and wife, and that at that time said Comerford's domicile was in Cass county, Missouri. This being so, then we must think that plaintiff is entitled to such portion of her husband's property as is given the widow of the deceased. It has been repeatedly held in this state that the four hundred dollars personal property set apart to the widow under section 107 of the statute, becomes immediately upon the death of the husband the absolute property of the wife. It is further held also that this provision was intended for the benefit alone of widows whose husbands were domiciled in this state—the section has no application to the widows of nonresident decedents. Richardson v. Lewis, 21 Mo. App. 531. This rests upon the established rule that the *lex rei sitae* governs the descent of real property, while the *lex domicilii* controls the distribution of personal property owned by the deceased. There is also another rule, well to be here stated, and that is, that a woman acquires at marriage the domicile of her husband, and her domicile continues the same as his, and changes with his, throughout their married life. The wife can not acquire a domicile separate and apart from her husband's; and "although they live apart, she still follows his domicile; nor will the fact that they have separated by agreement enable the wife to acquire a separate domicile." 5 Am. and Eng. Ency. of Law [1 Ed.], p. 868.

Having then in view these rules of law a solution of the question here becomes easy. The legal domicile of the Comerfords, at the death of the husband, was in Cass county, Missouri, even though at the time the wife lived in Nebraska and separate and apart from her husband. The laws of Missouri

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then must control in the distribution of Mr. Comerford's personal property. The statute law of that state directs, in that event, that the widow Comerford be entitled "to take such personal property as she may choose not to exceed the appraised value of four hundred dollars" (section 107), and this becomes her absolute property, not even subject to the husband's debts (section 108). There is no such qualification as that the wife must in fact be living or residing in this state at the death of her husband. The contention therefore of defendant's counsel that plaintiff had no legal claim to the provision made for the widow, is, it seems to us, without any merit.

In Mowser v. Mowser, 87 Mo. 437, the widow was held entitled to the allowance under this statute even though she had previously abandoned her husband without sufficient cause. The court there said that it was sufficient that "she was his wife to the day of his death." Though not entirely parallel, the following, from our own court, tend to sustain our present position. King v. Ex'r of King, 64 Mo. App. 301; McPherson's Adm'r v. McPherson, 70 Mo. App. 330; Austin's Estate, 73 Mo. App. 61.

The case of Farris v. Bante, 80 Ga. 187, is "on all fours" with this. It was there held that on the death of the husband domiciled in Georgia, his widow became entitled to a year's support out of his estate, as against creditors, even though she resided outside the state and had never been in Georgia.

We have examined the authorities which are claimed by defendant's counsel as sustaining his position. And while it must be admitted that some of these, particularly the case of Spiers' Appeal, 26 Pa. St. 233, seem adverse to our views, we yet think ourselves within the plain meaning of the statute and in harmony with better authority. Judgment affirmed. All concur.

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CHARLES F. MASON, Respondent, v. FOURTEEN MINING COMPANY, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Master and Servant:** TEST OF NEGLIGENCE: CUSTOM OF MINES: WAIVER: EVIDENCE. **The test of negligence in protecting the roof of a drift is the general use and ordinary course adopted in similar mines, and evidence of such usage is proper, and the more so where the defendant in his examination of witnesses adopted such theory, thereby authorizing the plaintiff to reply in rebuttal.**

2. **Appellate and Trial Practice:** REMARKS OF ATTORNEY IN HEARING OF JURY: HARMLESS ERROR: JUDGMENT RIGHT. **The remarks of counsel in the presence of the jury that the witness could prove another accident at the same place is highly reprehensible, and in a doubtful case would authorize a reversal, but where the judgment is manifestly for the right party such error is harmless.**

Appeal from the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

Galen & A. E. Spencer for appellant.

(1) It is elementary that the evidence must correspond with the allegations, and be confined to the point in issue. 1 Greenl. on Ev. [6 Ed.], sec. 50, p. 68; 1 Jones on Ev., sec. 136, p. 283; Haynes v. Christian, 30 Mo. App. 198; Eddy v. Baldwin, 32 Mo. 369; Greene v. Gallagher, 35 Mo. 226. (2) The issue in this case was whether defendant had exercised ordinary care to provide plaintiff a reasonably safe place to work. (3) Hence the court erred in permitting plaintiff's witness, Mason, to testify as to the "usual and ordinary method of timbering" and the "proper, usual and ordinary method of handling" this or similar ground. Koons v. Rail-

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road, 65 Mo. 592-597; Hughes v. Railroad, 127 Mo. 447; Crocker v. Schureman, 7 Mo. App. 358; Madison v. Mining Co., 65 Mo. App. 564; Lore v. Frogge, 19 Mo. App. 368; Coale v. Railroad, 60 Mo. 227; Lester v. Railroad, 60 Mo. 265; Hoffman v. Railway, 51 Mo. App. 273. (4) The assertion made by plaintiff's attorney during the trial that he could prove by the witness then undergoing examination, that another man had been injured at the same place in defendant's mine, at a different time, was error highly prejudicial to defendant. Crahan v. Balmer, 7 Mo. App. 585.

Charles Creller and *Clark Claycroft* for respondent.

(1) It is the duty of the master to use such care as should characterize a person of common prudence in the same position. The tools, machinery, or appliances furnished should be reasonably safe for the purpose to which it is intended to be devoted. Blanton v. Dold, 109 Mo. 74; Beard v. Car Co., 63 Mo. App. 382-387; Huhn v. Railroad, 92 Mo. 440-448. (2) The question as to whether the ground was timbered in the usual and ordinary way, was a question to receive a proper consideration from the jury. Huhn v. Railroad, 92 Mo. 440-449; Beard v. Car Co., 63 Mo. App. 382-387; O'Mellia v. Railroad, 115 Mo. 205-222; Bohn v. Railroad, 106 Mo. 429-433; 3 Elliot on Railroads, sec. 1274, and cases cited; Berning v. Medart, 56 Mo. App. 444-449. (3) The witness Mitchell, being an expert, the decision of the trial court to that effect was conclusive, unless it appears from the evidence to have been erroneous. Goss v. Railroad, 50 Mo. App. 614-622; Bradford v. Railroad, 64 Mo. App. 475-483; Benjamin v. Railroad, 50 Mo. App. 602. (4) The admission of improper testimony is cured by proper instruction. Sidekum v. Railroad, 93 Mo. 400-406; O'Mellia v. Railroad, 115 Mo. 205, 221, 222. (5) Appellant having examined respondent, Mason, as to the "usual and ordinary method of

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timbering ground by the use of snow-sheds," can not complain of evidence afterward introduced by respondent upon that point. Goss v. Railroad, 50 Mo. App. 614-623; Taylor v. Penquite, 35 Mo. App. 402; Whitmore v. Supt. L. K. & L. H., 100 Mo. 47; Tomlinson v. Ellison, 104 Mo. 112. (6) The improper remarks of counsel are cured by admonition of the court. Thompson on Trials, sec. 962, p. 746; Sidekum v. Railroad, 93 Mo. 407, 408; Loyd v. Railroad, 53 Mo. 515; Mahaney v. Railroad, 108 Mo. 191-200.

SMITH, P. J.—The plaintiff was in the employ of the defendant, a mining corporation, and while engaged in the work assigned him in one of the drifts of the defendant's mine a stone fell from the superincumbent roof of the drift and struck the defendant on the head, inflicting serious injuries, and to recover damages for which this action was brought.

There was a trial and judgment for plaintiff and defendant appealed. No complaint is made as to the action of the court in respect to the instructions. There are only two errors assigned, one relating to the admission of testimony, and the other as to a remark made by plaintiff's attorney in the presence of the jury.

It appears that during the progress of the trial the plaintiff asked a witness what was the usual and ordinary method, at the time of the injury, of timbering or handling ground, similar to that in defendant's mine. The witness had already testified that he had had some twelve or fifteen years experience as a miner, and had worked in a number of mines in the locality of defendant's mine. He had also testified that a snow-shed was a structure placed in the drifts of mines to protect the workmen against falling boulders, etc. The snow-shed in question, as appears from the undisputed evidence, was constructed by placing upright posts some six feet apart along the sides of the drift, on the caps of which

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were placed stringers running lengthwise with the drift and on the latter were placed transversely sticks of cordwood, thus forming what was called "a floor," which was designed to catch anything falling from above and thereby afford protection to the workmen below. The witness had also previously testified that he was familiar with the ground of defendant's mine. We think the question was proper and that the trial court did not err in allowing the witness to answer it. He had shown that he was sufficiently qualified to answer the question.

The ground upon which plaintiff sought a recovery was that the defendant had neglected to construct proper snowsheds in, or to timber over the drift in which plaintiff was working when he was hurt, so as to protect him from injury, etc. An employer is bound to furnish machinery and appliances that are of ordinary character and reasonable safety. It is needless to cite the adjudicated cases in support of this statement of the law. And the former is the conclusive test of the latter. Whatever is according to the general, usual and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law. The test is general use. Ship Building Works v. Nuttall, 119 Pa. St. 149; Railway v. Husson, 101 Pa. St. 1; Kohler v. Schwenk, 144 Pa. St. 348; Titus v. Railway, 136 Pa. St. 618; Reese v. Hershey, 163 Pa. St. 253; Jones v. Lumber Co., 58 Ark. 125; Railway v. Allen, 78 Ala. 494; Railway v. Huntley, 38 Mich. 537. Whether the drift in the defendant's mine was timbered up in the usual and ordinary way was a question for the jury. Huhn v. Railway, 92 Mo. 448; O'Mellia v. Railway, 115 Mo. 205.

If the jury had found from the evidence that the drift in defendant's mine was timbered in the usual and ordinary way, that would have exculpated the defendant from the charge of negligence. And no doubt this was at one time the defendant's view of the law, for it appears from the record that in

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its cross-examination of the plaintiff, while he was giving his testimony, it asked whether the snow-sheds put in the defendant's mine was not the usual and ordinary manner of protecting mining ground of the kind there. The defendant's right to object to the plaintiff's question was, we think, foreclosed by having himself previously asked a like question of other witnesses. The plaintiff was entitled to prove in rebuttal that the snow-shed or timbering in the defendant's mine was not that ordinarily in use in mines where the conditions were similar to those in that of defendant. The law of the case, as expressed by the defendant's first instruction, is in accord with what has just been stated by us.

During the further progress of the trial, the plaintiff's attorney asked a witness, on cross-examination: "Where was Fleming standing in that mine when he got his arm broken?" To this question the defendant objected, which objection was by the court sustained. The plaintiff's attorney then stated, in the hearing of the jury: "We can prove by this man that Fleming was in the same place." The defendant's attorney objected to this remark and requested the court to exclude it from the jury, which was done. The conduct of the plaintiff's attorney was highly reprehensible, and for which he should have been severely rebuked by the court. If the case was one where we entertained any doubt as to the right of the plaintiff to recover, or if it were a close case on the evidence, we should feel it our duty to reverse the judgment; but as the judgment is so manifestly for the right party, we feel constrained to affirm it, notwithstanding the unfairness of the plaintiff's attorney, which is accordingly ordered. All concur.

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J. H. DICKEY, Respondent, v. COVENANT MUTUAL LIFE ASSOCIATION, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Benefit Societies: REINSTATEMENT OF LAPSED MEMBER: MEDICAL BOARD V. MEDICAL DIRECTOR. Under the by-laws of defendant society the medical director acquires no right to pass upon the application of a lapsed member for reinstatement unless the medical board is not satisfied with such application or more than ninety days shall have elapsed since the applicant defaulted in his premiums.**
2. **———: REPUDIATED POLICY: RECOVERY OF PREMIUMS. Where a benefit society abandons its contract by wrongfully refusing reinstatement and declaring the policy forfeited, the member can treat the contract as at an end and recover his premiums with interest.**
3. **———: PETITION: AVERMENTS: PRAYER. If the petition contains the necessary allegations to recover premiums paid on a repudiated policy, the fact of an improper prayer will not prevent a judgment which is fully sustained by the matters alleged.**
4. **———: REINSTATEMENT OF LAPSED MEMBER: MANDAMUS: ELECTION. Though mandamus may be a remedy for the reinstatement of a lapsed member, yet he can elect to maintain an action for his premiums.**

Appeal from the Vernon Circuit Court.—*Hon. H. C. Timmonds*, Judge.

AFFIRMED.

Scott & Bowker for appellant.

(1) The proper remedy for a party refused reinstatement in a corporation to which he is rightfully entitled, is mandamus. Lysaght v. St. Louis, etc., Ass'n, 55 Mo. App. 538. (2) A party can not sue upon one cause of action and recover upon another; he must recover, if at all, upon the

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theory presented in his petition. Wright v. Fonda, 44 Mo. App. 634; O'Brien v. Loomis, 43 Mo. App. 29; Price v. Railway, 40 Mo. App. 189; Mason v. Railway, 75 Mo. App. 1; Stix v. Matthews, 75 Mo. 96; Sumner v. Rogers, 90 Mo. 324. (3) Where a policy simply provides that in case of loss, the insurer will pay to the beneficiary the amount realized from an assessment made on the members, not to exceed a certain amount, the mere proof of a loss, or a breach of such a contract, without more, only entitles the party to nominal damages. This is true of all policies issued prior to the enactment of section 5862, R. S. Mo. 1889. Taylor v. Nat. Temperance Union, 94 Mo. 35. (4) Where two parties agree to leave a certain matter between them to a third, and that his action shall be final, the action of such third party is binding upon both parties, except in case of fraud. Howard Co. v. Baker, 119 Mo. 397; Chapman v. Railway, 114 Mo. 542; s. c., 146 Mo. 481; Thompson v. Dickerson, 68 Mo. App. 535; Murphy v. Ins. Co., 61 Mo. App. 323.

M. T. January for respondent.

(1) By stating more than was required, plaintiff did not forfeit his right to recover upon proof of facts he was required to state and did state in his petition. Campbell v. Railway, 121 Mo. 340; Walker Bros. v. Railway, 68 Mo. App. 465; Knox Co. v. Goggin, 105 Mo. 182. (2) Reinstatement is a right under prescribed conditions and the right is a part of the contract. It is so recognized by the policy and the by-laws of the company, and a member can not be deprived of this right without cause at the whim or caprice of the company. Bacon on Benefit Societies, sec. 385. Davidson v. Benefit Society, L. R. A. Book 1, p. 482; Van Houten v. Pine, 38 N. J. Eq. 72. (3) Where an insurance company violates the contract of insurance by depriving the policy holder of his membership in the company, without good cause,

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the policy holder may treat the contract at an end and sue for damages. In such case the measure of damages is the total of premiums paid with interest. Suess v. Ins. Co., 64 Mo. App. 1; McKee v. Ins. Co., 28 Mo. 383; May on Insurance, p. 531, sec. 429. Contracts of mutual and stock companies are construed alike. Bacon on Benefit Societies, p. 230, sec. 180.

ELLISON, J.—Defendant in consideration of certain assessment premiums and an initiation fee issued to plaintiff a life benefit certificate or policy for $5,000. After making payments of such premiums during a course of several years, plaintiff failed to pay an assessment of $15.10 made against him by defendant and in consequence his certificate, by the terms of the contract between the parties as evidenced by the certificate and by-laws, became forfeited and of no effect, except that there was preserved to plaintiff a right of reinstatement under certain conditions set forth in the contract. Plaintiff made application for reinstatement and was refused. He thereupon brought this action praying a recovery of the "present value of said policy," in the sum of $4,500. Whether defendant rightfully rejected plaintiff's application for reinstatement is the principal question in the case. Plaintiff had judgment in the circuit court for the aggregate amount of the premiums which he had paid defendant and interest. Defendant claims such recovery was a departure from the petition and this is also made a point against the judgment.

The contract itself in connection with the by-laws which were made a part thereof clearly gave plaintiff the right to reinstatement after forfeiture for nonpayment of an assessment provided he complied with certain prescribed conditions to that end. He was required to make application therefor and to pay the defaulted assessment. The following are the provisions of the by-laws in this respect which are cited by the parties:

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"Art. II., Sec. 6. Medical Director.—The medical director shall examine all applications for membership or reinstatement, approve or reject the same, appoint local medical examiners and have supervision over them. He shall be at all times subject to the orders issued by the board of directors and the president, and shall perform such other duties in connection with his department as may be required."

"Art. V., Sec. 5. Reinstatement.—Any member having forfeited his or her membership by failing to pay any assessment or advance premium, may apply for reinstatement by furnishing a certificate of good health upon the forms furnished by the association, and paying all arrearages; provided, however, said certificate is not satisfactory to the medical board, or when more than 90 days shall have elapsed, the lapsed member shall furnish a new and full medical examination in such form and manner as the medical director may require, and the determination of the medical director as to whether such member shall be reinstated shall be final."

Plaintiff did make application for reinstatement on a form furnished by the company, accompanied by the defaulted payment. This application showed him to be in good health and did not disclose any change in his condition save as to increasing age. It was refused by defendant on the ground that its medical director had rejected it, and the accompanying money for arrearage was returned.

Defendant's contention is that the decision of the medical director was final and conclusive of plaintiff's right to reinstatement and relies on the by-laws above set out to sustain the contention. Plaintiff contends that the contingency had not arisen which authorized the medical director to act on his application and that the rejection of the application being based solely on account of the decision of that officer it was not authorized by the by-laws, was wrongful and amounted to a violation and an abandonment of the contract by defendant. We are of the opinion that plaintiff's view is the correct one.

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Construing together the two sections of the by-laws above set out, it is apparent that while it is the duty of the medical director to examine applications for reinstatement, such duty only arises in instances where the medical board is not satisfied with the application or certificate, or where more than ninety days have elapsed between the default and the application. In other instances the application is passed upon by the medical board alone and if satisfactory, on a *bona fide* examination by such board, the assured's right to reinstatement is complete. In the present case no contingency or condition existed for the exercise of the power of decision by the medical director, since ninety days had not elapsed and the medical board had not made known its dissatisfaction, if it had any.

2. On the question of the right to recover the premiums or assessments previously paid, we decided in the case of Suess v. Ins. Co., 64 Mo. App. 1, that where the insurance company abandoned the contract by wrongfully refusing to receive a premium when it was due and declaring the policy forfeited, the assured had a right to treat the contract as at an end and recover the money he had paid under it with interest. The principle of that case governs this, and is properly applied to a case where the company abandons the contract by wrongfully refusing reinstatement and declaring the policy forfeited. The right to reinstatement under certain conditions is a right vouchsafed by the contract. Bacon on Ben. Soc., sec. 385; Van Houten v. Pine, 38 N. J. Eq. 72; Nibblack on Ben. Soc., secs. 292, 293; Davidson v. Ins. Co., 39 Minn. 303. And if wrongfully refused the assured has the right to treat the contract as at an end.

3. But it is claimed that plaintiff's petition does not justify such recovery. It is true, the petition prays for recovery of $4,500, the present value of the policy. But it contains every allegation necessary to a recovery of the premiums or assessment paid, and we hold the mere fact of an improper prayer will not so govern the petition itself as to prevent a

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judgment which is fully sustained by the matters alleged. Comings v. Railway, 48 Mo. 512; Kneale v. Price, 21 Mo. App. 295; Biddle v. Ramsey, 52 Mo. 153; Crosby v. Bank, 107 Mo. 436; Harper v. Kemble, 65 Mo. App. 514. We rule the point against defendant.

4. It is suggested that plaintiff's remedy should have been mandamus to compel his reinstatement. But if our view as to plaintiff's right to treat the contract as at an end is correct, he has a right to maintain this action, whatever may have been his rights had he chosen to continue under the contract.

What we have said disposes of the action of the court on the instructions. The judgment will therefore be affirmed. All concur.

W. D. RODGERS et al., Respondents, v. FIRST NATIONAL BANK OF APPLETON CITY, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Justices' Courts: JUDGMENT: LIENS: TRANSCRIPT.** The transcript of a justice's judgment when filed in the office of the clerk of the circuit court is a lien against the defendant's real estate situated in the county.

2. **Homestead: JUDGMENT LIEN: MISSOURI DOCTRINE.** In Missouri the lien of a judgment does not attach to the homestead of the judgment debtor though it may be otherwise in other jurisdictions.

3. **Cloud upon Title: GRANTEE OF HOMESTEAD: JUDGMENT LIEN: PAROL EVIDENCE.** The grantee of a homestead by deed with condition subsequent can maintain a bill to remove from his title a cloud cast by transcript judgments of a justice against his grantor filed in the circuit clerk's office when it would require parol evidence to show the invalidity of such lien.

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4. **Equity: CLOUD UPON TITLE: PREVENTIVE REMEDY: MISUSE OF JUDGMENT. Where a record on its face purports to be a lien, though in fact, as can be shown only by parol evidence, it is not a lien, it constitutes an embarrassment in the use of the property, and equity, since its remedies are preventive as well as remedial, will not permit such misuse of the judgment as to injuriously hamper the landowner in the use of his own.**

Appeal from the Bates Circuit Court.—*Hon. J. H. Lay*, Judge.

AFFIRMED.

C. A. Denton for appellants.

(1) A judgment of a justice of the peace is not a lien on real estate owned by the defendant until a transcript is filed in the office of the clerk of the circuit court of the county in which the land is located. R. S. 1889, sec. 6287. The deed of J. M. Rogers and wife to the other plaintiffs was recorded October 14, 1896. The transcripts of the judgments were filed long thereafter, to wit: March 19, 1897. (2) The condition of forfeiture in the warranty deed of J. M. Rogers and wife, is a condition subsequent and a right that he alone and not a stranger could take advantage of, and therefore a judgment against him is not a lien on this right until he has taken advantage of the forfeiture by claiming a forfeiture. Messersmith v. Messersmith, 22 Mo. 369; Ellis v. Kyger, 90 Mo. 606. (3) The reservation in the deed of Rogers and wife, reserving to them the mansion house, gave to the said Rogers no such a possessory right that he could convey, or on which a judgment against him would be a lien. Fisher v. Nelson, 8 Mo. App. 90; Wadsworth v. Smith, 11 Me. 278; 26 Am. Dec. 525; Long v. Timms, 107 Mo. 519; Carr v. Lackland, 112 Mo. 460. A court of equity will not exercise its powers to declare that not to be a cloud which is shown by the said record not to be one. Colline v. Johnson, 120 Mo. 304; Fontaine v. Hudson, 93 Mo. 66; Beedle v. Mead, 81 Mo. 303; Clark v. Ins. Co., 52 Mo. 272.

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Thomas J. Smith for respondents.

(1) The respondents, J. M. Rogers and wife, having made a deed in which it was expressly provided that in case the grantees failed to pay them $150 per year during their lives, and providing that in case of failure so to do, the deed should be void, retained a conditional estate in the land which at their election upon failure of performance of these conditions subsequent would upon re-entry reinvest them with title to the land. 2 Washburn Real Property [3 Ed.], p. 10, par. 12; 6 Am. and Eng. Ency. of Law [2 Ed.], p. 500, par. 5; Ellis v. Kyger, 90 Mo. 606. (2) The fact that J. M. Rogers and wife had a homestead right in this real estate, depends upon facts the proof of which rests in parol, and, therefore, this suit is maintainable to remove the apparent cloud upon title. 6 Am. and Eng. Ency. of Law [2 Ed.], pp. 149, 150, 151; Beedle v. Mead, 81 Mo. 303; State ex rel. v. Philips, 97 Mo. 331; Longwell v. Kansas City, 69 Mo. App. 177. (3) Appellant in the court below admitted all the facts pleaded and then claimed and insisted that the transcript judgments were a lien against the real estate. Having tried the case upon that theory in the court below, appellant can not now be heard in this court to say that all these matters were untrue and have this court determine the case upon an entirely different theory. Whetstone v. Shaw, 70 Mo. 575; Walker v. Owen, 79 Mo. 563-568; Holmes v. Braidwood, 82 Mo. 610-617; Fell v. Coal Co., 23 Mo. App. 216-224; Martinowsky v. Hannibal, 35 Mo. App. 71-79.

SMITH, P. J.—The facts of this case are undisputed and are substantially these: (1), the plaintiff, J. M. Rogers, was the owner in fee of 160 acres of land on which he, with his wife, had continuously lived as their homestead for more than thirty years; (2), that the said plaintiff and wife executed several deeds of trust on said lands to secure the payment of

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debts amounting to $1,800; (3), that in the year 1895, the said plaintiffs, by their deed, conveyed to their co-plaintiffs the real estate hereinbefore referred to, subject to the said deeds of trust debts which the latter assumed to pay as a part of the consideration for said conveyance; that as a further consideration therefor, the co-plaintiffs agreed to pay the plaintiffs on the first day of every year, so long as the latter should live, one hundred and fifty dollars for their support and maintenance. The said deed contained a provision to the effect that the grantors reserved the sole and exclusive right to use and occupy the mansion house on said lands as long as they, or either of them should live, and in a case of a failure of the grantees therein "to comply in all things to be complied with by them as a part of the consideration aforesaid, when the same ought to be complied with, then the whole consideration shall be taken as having failed, and this deed shall be held as void and no title to said premises shall pass to said grantees;" (4), that in 1896, the defendant recovered before a justice of the peace several judgments against plaintiff J. M. Rogers, amounting to $368.50, and afterwards filed transcripts thereof in the office of the clerk of the circuit court, and it now claims that thereby the said judgments have become a lien against said land from the time of contracting of the debts upon which said judgments were based.

The petition of the plaintiff alleged, amongst other things:

"Said payments for support have been by the grantees in said last named deed made to the said J. M. Rogers and wife, and that they are still occupying the residence upon said premises as provided in said deed of conveyance so made by them; but that the amounts so stated as due and secured by the deeds of trust against the said land is now due and the plaintiffs are unable to pay the same without renewing said loan or securing a new loan on said land for the amount thereof; and that owing to the fact that said transcript judgments are of

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record as an apparent lien against said land it is impossible for the plaintiff to secure either a renewal of said loan or make a new loan on said lands for the amount necessary to pay off the said incumbrances against the same, for the reason that the homestead and exemption rights of the plaintiff, J. M. Rogers, in and to said lands both at the time of making of the said deed of conveyance to his co-plaintiff herein, and now are not matters of record but the evidence thereof rests in parol; and for said reasons the filing of the said transcript judgments as before stated are and constitute a cloud upon the title and rights of the plaintiff herein, and were filed by the defendant for the purpose of incumbering the plaintiff's title thereto, and preventing these plaintiffs from either renewing said loan or securing a new loan on said land to pay off said old loans, and for the purpose of harassing the plaintiff in the matter of protecting their title and interests in and to said land, knowing well that defendant has now and never did have any valid lien or right to the enforcement of said judgments or any part of them against the said land.

"Wherefore the plaintiffs ask that the judgment aforesaid be by this court decreed and declared to be no lien incumbrance against said real estate or any part thereof or the interest of any of the plaintiffs herein, and that the cloud upon the title thereto in the plaintiff by reason of the filing of the judgments in the office of the clerk of this court by the defendant be removed, and that the plaintiffs be declared and decreed to have as against the said judgments and the defendant, by reason of the said judgment and their filing as aforesaid the full title in and to the said land and the full and free right of disposition; conveying and mortgaging thereof, and for all proper relief warranted by the premises."

It appears from the record that during the progress of the trial the defendant admitted all the facts alleged in the petition, except the execution of said deed of plaintiff J. M. Rogers and wife to the other plaintiffs. This deed was sub-

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sequently read in evidence without objection. The finding and decree was for plaintiff and defendant appealed.

The transcript of the justice's judgment when filed in the office of the clerk of the circuit court was as much a lien against the real estate of J. M. Rogers as if it had been given in the circuit court. R. S. sec. 6287. Judgments rendered by any court of record are a lien on the real estate of the person against whom rendered, situate in the county for which the court is held. R. S. sec. 6011.

With respect to the effect of judgments upon homestead estates there are two classes of decisions. The first holds that the lien of a judgment does not attach to the homestead of the judgment debtor. Lamb v. Shays, 14 Iowa, 567; Green v. Marks, 25 Ill. 221; Houghton v. Lee, 50 Cal. 103; Black v. Epperson, 40 Tex. 162; Morris v. Ward, 5 Kan. 247; Martin v. Meredith, 71 N. C. 215. And the second holds that such lien does attach, but remains in abeyance while the premises continue to be occupied as a homestead and becomes potential as soon as the right of the homstead ceases, whether by separation of the family, abandonment or by alienation. Moon v. Granger, 40 Ark. 574; Smith v. Brockett, 36 Barb. 571; Whitworth v. Lyons, 39 Miss. 467; Bank v. Carson, 5 Neb. 47; Eberharts Appeal, 39 Pa. St. 509.

The cases in this state are to be assigned to the first class. Beckmann v. Meyer, 75 Mo. 333; Holland v. Kreider, 86 Mo. 59. If the said lands were covered by the homestead exemption of the said J. M. Rogers the judgment was not a lien thereon; but whether or not they were so covered was not disclosed by the record. If a fact, it could only be established by extrinsic parol evidence.

The defendant's contention here is that, even admitting the facts to be as we have stated them, still a court of equity is without jurisdiction to afford the protection prayed for in the petition of plaintiff. Some of the elementary books on equity jurisprudence, and, as well, some of the adjudged

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cases, state the rule to be, that a court of equity will set aside a deed, agreement or proceeding affecting real estate, where extrinsic evidence is necessary to show its invalidity, because such instrument or proceeding may be used for annoying and injurious purposes at a time when the evidence to contest or resist it may not be as effectual as if used at once. Still, if the defect appears upon its face, and a resort to extrinsic evidence is unnecessary, the reason for equitable interference does not exist, for it can not be said that any cloud is cast upon the title. Pomeroy's Eq. Jurisp., sec. 13999, and cases cited in note 2; Story's Eq. Jurisp., sec. 700.

In Clark v. Ins. Co., 52 Mo. 272, it was said: "The settled rule is, that when the defect appears upon the face of the record, through which alone the opposite party can claim title, there is not such a cloud upon the title as to call for the exercise of the equitable powers of the court to remove it. But when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it, as a cloud upon the title. Cox v. Clift, 2 Comst. 118; Ward v. Dewey, 16 N. Y. 529; Piersoll v. Elliott, 6 Pet. 95. The distinction in the two classes of cases is not only founded in reason, but exists in the very nature of things. It may be safely assumed, when such circumstances exist in connection with a deed as not only to give it an apparent validity, but to enable the grantor to make out a *prima facie* title under it, a cloud is created. In showing title under a deed by the grantee himself, or in showing that the deed constitutes a cloud upon another's title, it is necessary to show some sort of title, either real or apparent, in the grantor. The fact however is very material as to the manner in which the title of the grantor is shown. If a grantee in a deed, void for some reason not appearing upon its face nor in any of the previous deeds, is able to show a regular

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chain of conveyances down to his immediate grantor, then no one would doubt that the deed constituted a cloud upon the title. But if in the investigation, in tracing back the title, a defect appears upon the record, then it is evident there is no cloud, for the face of the record furnishes the means of detecting the error, and apprising parties of the true state of the title." Colline v. Johnson, 120 Mo. 299; Fontaine v. Hudson, 93 Mo. 66; Bank v. Evans, 51 Mo. 335; State ex rel. v. Philips, 97 Mo. 333; Beedle v. Mead, 81 Mo. 303; Longwell v. Kansas City, 69 Mo. App. 177.

Under the deed from J. M. Rogers and wife to their coplaintiffs, undoubtedly passed the fee in the lands. The reservation to occupy the mansion house was no more than a privilege that was not assignable or vendible. Fisher v. Nelson, 8 Mo. App. 90. The condition contained in the deed was a condition subsequent. In the event of the nonperformance of this condition as to the payment to the grantor of the annuity, or as to any other condition, the right to take advantage of the forfeiture could not be exercised by a stranger, but only by the grantors. The estate would not be divested but would continue in the grantees until an entry by the grantors, or the equivalent thereto. Messersmith v. Messersmith, 22 Mo. 369; Ellis v. Kyger, 90 Mo. 600. But where the grantees take advantage of the forfeiture the title reinvests in them, and the judgments of the defendants would apparently become a lien thereon, while not really so in fact. The lands so conveyed by the said J. M. Rogers and wife were not subject to defendants' judgment, and if the title should revest in the former, by reason of the forfeiture of the condition subsequent in the deed, their homestead estate thereon would not in any way be impaired or destroyed. The lien of the judgment would no more attach to the homestead after the reinvestiture of the title than it did before the conveyance was made.

We do not suppose it would be contended, if one convey

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his homestead to another in consideration of the payment of an annuity during his life, and upon the condition that if the annuity be not paid the conveyance to become void and the estate to revest, that in case of a forfeiture of the condition and revesture of the title, his homestead rights would thereby become extinguished, and especially so when, as here, he has not acquired another homestead but has remained in continuous occupancy of the mansion house thereon, under a reservation in the conveyance. If the defendant, after forfeiture and revesture, should sue out an execution on the judgment, and a sale should take place thereunder, the title, so far as disclosed by the record, would pass to the purchaser under the sheriff's deed. The record would then show a *prima facie* title in him. But this title would be invalidated by showing that the land so acquired was a homestead estate. This however could not be established by the record, but by extrinsic parol evidence. Accordingly, it would seem from this that the case is one in which a court of equity may properly interfere. The defendants' judgment would apparently be a valid lien on the land, and is for that reason calculated to throw some doubt upon the title, or it is at least capable of future misuse. The jurisdiction of courts of equity is not merely remedial but is also exercised to prevent injustice. Noll v. Morgan, decided by us at present term, *supra,* 112.

The defendant, by filing the transcripts of its judgments, has cast a cloud over the title of the grantees, and caused the validity thereof to be doubted; and has thereby succeeded in depreciating its market value.

The grantees, presumably, have not only paid said annuities, but, as well, the interest and taxes on said lands since their purchase. They are not full handed and now find themselves unable to discharge the deed of trust debts which have become due. By reason of the said conditions, brought about by the filing of the transcript judgments, and the defendants' assertion that said judgments are a lien on said land, the care-

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ful and prudent capitalist and money lender is deterred from either extending the present deed of trust debt on the land, or from making a new loan thereon, and as a result thereof the plaintiffs' interests in said lands are likely to be sacrificed by a foreclosure of the deed of trust. The plaintiffs are helpless unless a court of equity will, in the exercise of its jurisdiction, interfere to avert the serious disaster which threatens to overtake them. A court of equity will not permit such a misuse by the defendants of its judgment. The trial court, we think, did not err in granting the plaintiffs the relief prayed in their petition.

The decree is affirmed. All concur.

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CITY OF RICH HILL to use, etc., Appellant, v. PAULINE K. DONNAN, Respondent.

Kansas City Court of Appeals, January 8, 1900.

1. **Tax Bills:** CITY OF FOURTH CLASS: SIDEWALK: ENGINEER'S ESTIMATE. An engineer of a city of the fourth class can not delegate to a private citizen his duty and authority to make an estimate for a proposed sidewalk, and an estimate by such citizen with his permission will not authorize the contracting and building of said walk and the issuing of tax bills therefor.

2. **City of Fourth Class:** SIDEWALK: DESIGNATED MATERIAL. An ordinance directing the building of a sidewalk in a city of the fourth class should designate of what material the particular walk should be constructed, and a provision that it may be of wood, stone or brick is insufficient and the ordinance is void. Gallagher v. Smith, 56 Mo. App. 116, distinguished.

Appeal from the Bates Circuit Court.—*Hon. J. H. Lay*, Judge.

AFFIRMED.

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Templeton & Hales and *M. T. January* for appellant.

(1) Failure to file plans and specifications by the city engineer does not invalidate the tax bill. Sheehan v. Owen, 82 Mo. 458; Marionville to use v. Henson, 65 Mo. App. 397; (2) Ordinance number 284 contained the plans and specifications. This was sufficient. Sheehan v. Owen, 82 Mo. 458. (3) The tax bill made a *prima facie* case. Session Acts 1895, p. 85, sec. 92. (4) Ordinance number 284 is not invalid by reason of providing that sidewalks could be constructed of either of three kinds of material. Gallaher v. Smith, 55 Mo. App. 116; Connersville v. Merrell, 42 N. E. Rep. 1112.

Thos. J. Smith for respondent.

(1) Ordinance number 284 under which the work sued for was done, is void. Session Acts 1895, sec. 95, p. 87; Coggeshall v. Des Moines, 41 N. W. Rep. 617; 2 Dillon Municipal Corporations [3 Ed.], sec. 811, p. 806; Hydes v. Joyes, 4 Bush. 464-468. (2) The street commissioner and "acting engineer," as he admits, never made and filed any estimate of the cost of the sidewalks proposed. This was an indispensible condition precedent to a valid contract with relator binding upon defendant's property. Elliott on Roads and Streets, p. 429; Independence v. Briggs, 58 Mo. App. 241; Kiley v. Oppenheimer, 55 Mo. 374; Westport v. Mastin, 62 Mo. App. 647; Rose v. Trestrail, 62 Mo. App. 352; State v. Warner, 66 Mo. App. 152; State v. Wellott, 54 Mo. App. 310; Session Acts 1895, sec. 91, p. 85.

ELLISON, J.—This is a suit on a special tax bill issued to a contractor for the construction of a sidewalk in Rich Hill, a city of the fourth class and organized under the provisions of Article 5, chapter 30, Revised Statutes 1889, as

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amended by Laws of 1895, page 66. The judgment below was for defendant.

There are many objections urged here against the validity of the bill. We deem it only necessary to notice two. It is provided by section 91 of the amendatory act, that before the board of aldermen shall make a contract for building bridges, sidewalks, culverts or sewers, or for paving, etc. an estimate of the cost shall be made by the city engineer, or other proper officer, and submitted to the board of aldermen, and that no contract should be entered into exceeding such estimate. Such estimate is a prerequisite to the authority to contract for building sidewalks, and if not made the contract and tax bill issued thereunder are void. Independence v. Briggs, 58 Mo. App. 241.

In this case an estimate was made in the name of the proper officer of Rich Hill, but it was not made by him. He delegated that duty to one or two other persons (a Mr. Tedford and Mr. Bird), by telling them that he "didn't have much time" and that if while he "was away anything comes up that needed me for them to go ahead for me in my place." In answer to a question whether he made an estimate he answered: "Mr. Tedford did for me because I was working and probably away at that time, but if anything came up he was to attend to it, and if my name was put to it Mr. Tedford or Mr. Bird did it." This was a wholly unwarranted proceeding. Instead of an estimate being made by the officer designated by law, we have one gotten up, for aught appearing to the contrary, by one of two private persons.

This is sufficient to dispose of the case. But in view of the record showing that other walks were provided for in this ordinance it may as well be further remarked that the ordinance itself is void for the reason that it does not designate of what material the walk shall be composed. The provision intended to cover this necessary part of the legislative function, is "that there shall be wooden, stone or brick sidewalks

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constructed." It then provides how they shall be constructed if of either of these materials. That portion as to "wooden" walks is: "All sidewalks laid of wood shall be two-inch lumber, hardwood or pine and number one quality." It has been frequently decided that the material of which a street should be paved, or a sidewalk constructed, is a matter to be determined by the municipal legislature. This should be done with sufficient definiteness to disclose of what material the particular walk provided for in the ordinance should be constructed. A city council ordering a sidewalk constructed of wood, stone or brick fails to exercise the authority reposed in it of designating what kind of material shall be used. Coggshall v. Des Moines, 78 Iowa, 235. This should not only be done for the reason that it is a legislative duty imposed on the council which they can not delegate to others, but it is necessary to the proper working of other mandatory provisions of the law. How can publication be had, bids be made or contracts let, having for their base an ordinance so indefinite and uncertain as the one under consideration? Much confusion will frequently ensue and certainly, effective competition would be neutralized or altogether lost.

Plaintiff's case is not supported by that of Gallaher v. Smith, 55 Mo. App. 116. In that case the city council ordered a wooden sidewalk to be constructed of pine, white or burr oak lumber. That is to say, the council was of the opinion that a wooden walk was necessary and ordered it to be constructed of either white or burr oak or pine; either of these materials would, in the judgment of the council, make a walk equally good. But in the present case different kinds of walks, composed of wholly different material, are named with no direction as to which of the widely different kind will be contracted for. There is an entire absence of legislative choice. In the Gallaher case, Gill, J., said: "Cases may arise where from the face of the ordinance it may appear that the council had abandoned the exercise of its judgment and

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discretion and reposed the performance of its duties on another. When an instance of that kind is presented it will be, doubtless, our province to condemn it and declare the ordinance void."

From the foregoing views it results that the judgment should be affirmed. All concur.

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82 390 96 [1]657 ELIZA W. CULVER, Respondent, v. D. H. SMITH et al., Appellants.

Kansas City Court of Appeals, January 8, 1900.

1. **Parties:** ACTION: JOINT CONTRACT: CONSIDERATION. Joint obligees must both sue upon the contract, and a contract dismissed in the opinion is held to be a joint contract having a joint consideration.

2. **Equity:** DECEIT: FRUITS OF BARGAIN. Deceit rests upon fraudulent motive, but it is against good conscience that a party keep the fruits of a bargain obtained by his representation which turns out to be false; and, on the evidence and pleadings in this record, it stands admitted that the representation as to title of certain land was false.

3. **Release:** PAYMENT BY ONE JOINT OBLIGEE: PLEADING: PRACTICE. An answer asked a credit for a payment made by one of the joint obligees after suit brought but pleaded no release on that ground. Defendants can not change their position in the appellate court and claim such payment as a discharge.

4. **Appellate Practice:** EVIDENCE: CONFLICTING: FOLLOWING TRIAL COURT. The trial court is in a better position than the apellate to weigh the conflict in the evidence in this record.

5. ———: PARTIES: REVERSAL: JUDGMENT FOR RIGHT PARTY: RELEASE. Where the judgment is for the right party the appellate court will not reverse by reason of non-joinder of a party if in the designated time the release of such party be filed.

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Appeal from the Jackson Circuit Court.—*Hon. J. H. Slover,* Judge.

AFFIRMED (*si*).

Fyke, Yates, Fyke & Snider and *Montgomery & Montgomery* for appellants.

(1) The contract read in evidence was a joint contract, and the right of action thereon was joint. There are no words in the contract of severance to produce a severed right. The right of action being joint, one party to it suing alone was not entitled to recover. 1 Parsons on Contracts [5 Ed.], p.11; Henry v. Mt. Pleasant Township of Bates County, 70 Mo. 500; Ryan v. Riddle, 78 Mo. 522, 523; Churchill v. Lammers, 60 Mo. App. 250; Board, etc., St. Louis Public Schools v. Estate of Savings Bank, 12 Mo. App. 106; s. c., affirmed in 84 Mo. 56; Webb's Pollock on Torts, p. 653; Dewey v. Carey, 60 Mo. 224, 225, and cases cited; Parks v. Richardson, 35 Mo. App. 197; Clark v. Cable, 21 Mo. 225; Rainey v. Smizer, 28 Mo. 311; Ohmsorg v. Turner, 33 Mo. App. 487; Muldrow v. Railway, 62 Mo. App. 345; McLaran v. Wilhelm, 50 Mo. App. 658; Cross v. Williams, 72 Mo. 580; Wilson v. Railway, 120 Mo. 58; Schubert v. Herzberg, 65 Mo. App. 584. (2) The settlement and discharge of Fernald, one of the joint tort-feasors, in full from all liability for the consideration of $500 paid by him, was a discharge also of his co-defendants. Turner v. Hitchcock, 20 Iowa, 319 Finlay v. Bryson, 84 Mo. 664; McDonald v. Forsyth, 13 Mo. 549; 46 Central Law Journal, No. 19, p. 390, and authorities cited. (3) There was no evidence of any fraud on the part of the defendants or of any fraudulent representation by them or either of them to the plaintiff. The whole of the evidence on this point is that contained in the contract between the parties. The plaintiff has elected to affirm the

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contract, and he can not now sue for and recover damages for false representation, except by proving the fraud. Yeater v. Hines, 24 Mo. App. 628. (4) The finding of the court is contrary to the great weight of evidence.

Kinley, Carskadon & Kinley for respondent.

(1) The representations not known to be true, were under the law fraudulently made by defendants. Sitz v. Deihl, 55 Mo. 17; Skinner v. Rurnell, 52 Mo. 96; Williams v. Crow, 84 Mo. 298; Woodhall v. Kelly, 85 Ala. 368; Yeomans v. Bell, 29 N. Y. Sup. 502. (2) The acts of defendants in representing that the Kansas City & Southern Lumber Co. owned these lands, when it did not, was fraudulent. The rule is, where a party to a bargain makes to the other party a statement of a material fact which he either knows to be false, or which he does not know to be true at the time he makes it, and the other party acts upon the representations to his loss, this entitles him to equitable relief. It is against good conscience for a party to keep the fruits of a bargain obtained by such means. Caldwell v. Henry, 76 Mo. 254; Walsh v. Morse, 80 Mo. 568-573; Florida v. Morrison, 44 Mo. App. 529; Ring v. Vogel, 44 Mo. App. 111; Biglow, Fraud, 11; Redgrave v. Hurd, 20 Chy. Div. 1, 12 e. a.; Cooley on Torts, 586; Glasscock v. Minor, 11 Mo. 655; Hamlin v. Abell, 120 Mo. 188. (3) The defendants have waived any claim concerning the alleged misjoinder of parties. If the misjoinder exists and does not appear on the face of the petition, it should be raised by answer, and a failure to raise the question is a waiver thereof. (4) Conceding this suit to be based on the contract between defendants and E. W. and H. A. Culver, the considerations for the agreement coming separately from each of them, as alleged in the petition, and both admitted and alleged in the answer, makes the contract a several instead of a joint contract. The rule is, that

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if the consideration moves from many persons jointly the promise is joint; but if the consideration moves from many persons, but from each severally, then the contract is several. 1 Pars. Cont. Marg., p. 18; Bush v. Haeussler, 26 Mo. App. 265; Cross v. Williams, 72 Mo. 577; Sharp v. Conkling, 16 Vt. 355. (5) The settlement with Fernald was not an effort on the part of plaintiff or Fernald to settle the entire claim, but to release Fernald. Even if it did discharge defendants (which is strenuously denied) the defendants can not now for the first time in this court raise the question. Hyde v. Hazel, 43 Mo. App. 668; Cooke v. Railroad, 57 Mo. App. 472; Brown v. Weldon, 27 Mo. App. 251; Noble v. Blount, 77 Mo. 235; Stones v. Richmond, 21 Mo. App. 17; Hammerslough v. Cheatham, 84 Mo. 13; Bray v. Marshall, 75 Mo. 327.

SMITH, P. J.—The petition is in two counts, in the first of which it is alleged that the plaintiff was the owner of certain real estate in Kansas City, in this state, describing the same, and that the defendants were the owners of 400 shares, being the entire capital stock, of the Kansas City & Southern Lumber Company; that the defendants falsely represented that the said corporation had the title to 8,700 acres of land situated in the state of Arkansas, and that, relying upon said false representations the plaintiff made a contract with the defendants by which they agreed to transfer to the plaintiff 300 shares of stock in said corporation; that in pursuance of said contract, and in consideration of said stock in said corporation, the plaintiff conveyed to the defendants the property owned by him in Kansas City; that the title to 600 acres of the lands represented by defendants to be owned by the corporation had failed, and that thereby the plaintiff's stock depreciated to the extent of $6,000. Judgment was demanded against the defendants for $6,000 and that his vendor's lien be enforced against the said real estate conveyed by

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him to the defendants. And the other is a duplicate of the first, except that it is therein alleged that H. A. Culver owned certain other real estate in Kansas City, and that he made a contract with defendants for the exchange of the said real estate for 100 shares of stock in said corporation, and that by reason of the failure of the title to the aforesaid 600 acres his said stock was depreciated in the sum of $6,000, and that he had assigned "his claim against the said defendants" for a vendor's lien on account of "the failure of the title" to the plaintiff. Judgment was demanded for this sum of $6,000 and for the enforcement of a vendor's lien.

The answer contained numerous admissions and denials which need not, in this connection, be referred to. There was a trial and decree for the plaintiff. Defendants appealed.

During the progress of the trial the contract referred to in the petition was introduced in evidence by plaintiff which recited, (1), that the stockholders in the said Lumber Company (who are defendants herein), transferred the 400 shares of stock in said Lumber Company to E. W. Culver and H. A. Culver, which stock represented 8,700 acres of land owned by said Lumber Company, etc.; (2), that the consideration to be paid by said Culvers for said 400 shares of stock was the transfer to said stockholders of certain real estate in Kansas City—describing it; (3), that the said stockholders agreed that the title of said lumber company to said 7,800 acres of land "was good and sufficient title to hold said land."

At the conclusion of the plaintiff's evidence the defendant interposed a demurrer thereto on the ground that if any right of action had accrued "it was a joint action of the two Culvers and that they must both join in the suit." This was by the court overruled and the action of the court in that regard is assigned here as reversible error.

The ground upon which the plaintiff bases his claim for equitable relief is that by means of the fraudulent representations of defendants as to the title to said 8,700 acres of land,

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plaintiff and H. A. Culver were induced to enter into said contract; that they were induced thereby to enter into a contract by which they agreed to accept a conveyance of said Arkansas real estate, which invested them with no title to a part thereof, and to convey to defendants, as a consideration therefor, the title to their own real estate. Whether or not the plaintiff can prosecute this action without joining H. A. Culver as a party plaintiff with him depends upon the construction to be placed upon the contract.

It was said by Mr. Justice Redfield in Sharp v. Conklin, 16 Vermont, 355, that, "the rule is perfectly established that where the interest in the subject-matter secured by a covenant is several, although the terms will naturally bear a joint interpretation, yet if they do not exclude the inference of being intended to be several they shall be so taken; they shall have a several construction put upon them." In Parsons on Contracts, 18, it is stated: "The nature and especially the entireness of the consideration is of the greatest importance in determining whether the promise be joint or several, for if it moves from many persons jointly the promise of repayment is joint, but if from many persons, but from each severally, then it is several." Judge Bliss in section 63 of his work on Code Pleading, in speaking of the effect of the rule requiring the real party in interest to sue, upon cases where the obligation is to more than one, that is, where the contract seems to be made to the obligees jointly, but the money to be paid or the thing to be done for the benefit of each is specified, observes: "This is spoken of as a joint interest because by the form of the agreement the obligation to them is joint, although there is no joint interest in the benefit to be derived from it."

It is the well-settled rule of law in this state that when an obligation has been executed to two jointly they must both sue upon it. One of two joint obligees, without the concurrence of the other can not sue upon a joint contract, unless

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both agree there can be no action upon it. Clark v. Cable, 21 Mo. 225; Rainey v. Smizer, 28 Mo. 311; Ryan v. Riddle, 78 Mo. 523; Dewey v. Carey, 60 Mo. 224; Ohnsorg v. Turner, 33 Mo. App. 487; Muldrow v. Railway, 62 Mo. App. 431; McLaran v. Wilhelm, 50 Mo. App. 658; Cross v. Williams, 72 Mo. 580; Parks v. Richardson, 35 Mo. App. 197. And there is nothing in the present practice act which affects the law of joint contracts. That act deals only with the mode of procedure and does not affect the law of contracts as it existed prior to its enactment. Clark v. Cable, *ante*. The statute in this regard has remained unchanged since the decision just referred to. R. S. 1889, secs. 1994, 2047; Laws of 1848-49, p. 76, sec. 7; R. S. 1855, p. 1218, sec. 5; Laws of 1848-49, p. 80, sec. 6; R. S. 1855, p. 1231, sec. 10.

Here the contract shows that the obligation of the defendants to the Culvers was joint and the consideration to pass from the latter to the former was joint and not several. It was not specified in the contract of the Culvers in consideration of the joint promise to them, each would convey his individual or separate real estate to the defendants; or, in other words, the contract does not disclose that the consideration for the promise of the defendants to the Culvers was several. The consideration, it clearly appears, was the joint conveyance by them to the defendants of certain real estate. Had it been disclosed by the contract that the consideration for the promise was a conveyance of certain parts of said real estate by each of the Culvers, or that defendants were obligated to convey to each of the Culvers a specified part of said lands, or a specified number of shares each in said lumber company, then, according to the rule announced by the authorities referred to, an action could be prosecuted in the name of each of the Culvers in his own behalf. It seems to us that the terms of the contract here in issue most manifestly bear a joint interpretation and exclude the inference of being intended to be several. The rule requiring, where an obligation is executed to two jointly,

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that both must sue upon it, is, we think, applicable to the present case. It follows from these observations that we are unable to approve the action taken by the circuit court on the defendants' demurrer.

It is further insisted by the defendants that there was no evidence adduced tending to prove any fraudulent representations were made to plaintiff by them, or either of them, and for that reason plaintiff ought not to have recovered. The petition, as has been seen, alleged that the defendants falsely and fraudulently represented to plaintiff that the said lumber company had title to said 8,700 acres of Arkansas lands, when it had title to only 8,000 acres, and that the title to 600 acres thereof was in other parties and claimed adversely by them, and that in consequence thereof the title to said 600 acres had failed. It was admitted by the answer that defendant represented to plaintiff that the lumber company had title to the said 8,700 acres of land, and that the title to 240 acres thereof was not vested in the lumber company at the time the exchange was made. The contract itself recites that the lumber company had title to the 8,700 acres of land. It stands admitted by the pleadings not only that the representations as to title were made, but that the same were at least in part untrue. So that the trial court was justified by the admissions in the pleadings and the evidence in finding that the representations were made and that the same were false.

The common law action for deceit rests upon a fraudulent motive, a *scienter*, an intent to cheat or deceive. In actions like this, the fraudulent representations which will entitle the plaintiff to relief need not be of that strict character which is necessary to support a common law action for deceit. Where a party to a bargain makes to the other party a statement of a material fact, which he either knows to be false or which he does not know to be true, at the time he makes it, and the other party acts upon the representation to his loss, this entitles him to equitable relief. It is against good conscience for a

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party to keep the fruits of a bargain obtained by such means. Florida v. Morrison, 44 Mo. App. 539; Caldwell v. Henry, 76 Mo. 254; Walsh v. Morse, 80 Mo. 568-573; Ring v. Vogel, 44 Mo. App. 111; Bigelow on Fraud, 11; Redgrave v. Hurd, 20 Chy. Div. 1, 12 e. a.; Cooley on Torts, 586; Glasscock v. Minor, 11 Mo. 655; Hamlin v. Abell, 120 Mo. 188. It seems to us that the admissions of the pleadings and the evidence relating to the falsity of the representations taken together clearly negate the idea that the defendants may have made the representation innocently, or on mistaken information, or upon a *bona fide* belief, founded upon reasonable ground that they were true. We can not doubt that the fraudulent representations were sufficiently established to justify the finding.

The defendants in their answer alleged that since the institution of the suit that the defendant Fernald had paid plaintiff the sum of $500 for and on account of the cause of action set out in his petition and that they were entitled to a credit thereon for that amount. Defendants now claim that this payment had the effect to discharge all of the defendants. There was no plea of release. No such defense was interposed by the answer. The defendants having claimed in the trial court that the payment was but a credit on the cause of action stated in plaintiff's petition, can not be allowed here to take a position at variance with that there taken. This goes with the saying.

The defendants' able and ingenious counsel have argued with much force and plausibility that the finding of the court was against the weight of the evidence. It must be conceded that there was much conflict of opinion amongst the witnesses who testified as to the value of the land to which the title had failed. The court was in a better position to weigh the conflicting evidence than we are; and we can not say that injustice has been done by the finding of the court either on the claim

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made by the plaintiff or on the counterclaim set up in the defendants' answer.

We shall not reverse the decree on account of the error in the trial judge in overruling the defendants' demurrer, since a retrial of the cause with proper parties would probably lead to the same result. The defect can be remedied here by appropriate action. Muldrow v. Railway, 62 Mo. App. 431. Accordingly it is ordered that upon the filing by the plaintiff, within ten days hence, of the joint release of plaintiff and his co-obligee H. A. Culver to defendants of all further actions for the fraud and false representation complained of in this case, the judgment herein will be affirmed; otherwise, it will be reversed. All concur.

FARMERS' NATIONAL BANK, Appellant, v. ALPHONSE H. DREYFUS, Respondent.

Kansas City Court of Appeals, January 8, 1900.

1. **Negotiable Instruments:** BANK CHECKS: PRESENTMENT. Bank checks are negotiable instruments though not expressed to be for value received, but are not designed for general circulation but for immediate payment, and if not promptly presented the holder keeps them at his peril.

2. ——: ——: PRESENTATION: REASONABLE TIME. A check should be presented in a reasonable time, to wit, the next day after receipt, unless cause for the delay appears. But where the facts are disputed, what is a reasonable time is for the jury, otherwise it is a mere question of law.

3. ——: ——: DISHONORED. A check, which, without excuse for delay, is held longer than next day after its receipt, is dishonored and the indorsee takes it subject to equities.

4. ——: ——: STALENESS: EQUITIES: INDORSEE. A check held for twenty-six days without effort to present it becomes stale, and an indorsee will then take it subject to all defenses the drawer may have against the original payee. Cases distinguished.

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5. ——: ——: CONSIDERATION. A check without consideration, the original object of its drawing having failed, should be returned to the drawer, and this applies to a belated indorsee.

Appeal from the Jackson Circuit Court.—*Hon. J. W. Henry*. Judge.

AFFIRMED.

Downs, Guthrie & Downs for appellant.

(1) Bank checks are negotiable instruments subject to the same rules which govern ordinary bills of exchange. Gate City v. Bank, 126 Mo. 82; Famous, etc., v. Crosswhite, 124 Mo. 34; Burns v. Kahn, 47 Mo. App. 215. (2) A check is presumed to have been given for value. Newcomb v. Jones, 37 Mo. App. 475. (3) A *bona fide* purchaser of negotiable paper for value before maturity becomes the owner of the same, notwithstanding any defects in the title of the person from whom he acquired it. Savings Institution v. Heinsman, 1 Mo. App. 336. Gage v. Averill, 57 Mo. App. 111. Whether defects arise out of fraud or felony, *supra*. Fitzgerald v. Barker, 96 Mo. 661; Bank v. Stoneware Co., 4 Mo. App. 276; Bank v. Pipkin, 66 Mo. App. 592; Hamilton v. Marks, 63 Mo. App. 167; Ganz v. Weisenberger, 66 Mo. App. 110. All this applies to bank checks, whether with or without the word "value received." Shoe and Clo. Co. v. Crosswhite, 124 Mo. 34.

Grant I. Rosenzweig and *Wash Adams* for respondent.

(1) Where no time is fixed, reasonable time, is implied. State ex rel. v. Harrison, 53 Mo. App. 346; Lapsley v. Howard, 119 Mo. 489. (2) Limitation and maturity of demand paper begin to run from their date. Easton v. McAllister, 1 Mo. 662; Mason v. Patton, 1 Mo. 279. (3) Checks are not intended for circulation, but for present, prompt and uninterrupted use. Marbourg v. Brinkman, 23 Mo. App. 511; Dyas

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v. Hanson, 14 Mo. App. 363; Rosenblatt v. Haberman, 8 Mo. App. 486; Bank v. Bank, 30 Mo. App. 271; Wear v. Lee, 87 Mo. 358. (4) Checks, drafts and notes due on demand, or certain number of days after demand or sight, are negotiable only for a limited time—such time as is reasonably necessary for delivery and prompt transmission to the drawee bank for payment. After that time, they are subject to equities like a past due promissory note. Where delay is not explained, its reasonableness is a question of law. Wethy v. Andrews, 3 Hill (N. Y.), 582; London v. Groom, 8 C. Q. B. Div. 288; 3 Randolph, Com. Paper, 1045; Tiedeman, Neg. Inst., 446; Linville v. Welch, 29 Mo. 203; Salisbury v. Renick, 44 Mo. 554; Singer v. Dickneite, 51 Mo. App. 245; Tower v. Pauly, 51 Mo. App. 75; Lab v. Stephacker, 103 Pa. St. 81; Mohawk v. Broaderick, 10 Wend. 304; Aymer v. Beers, 7 Cowan, 711; Moody v. Mack, 43 Mo. 210; Chouteau v. Rowse, 56 Mo. 65; Faust v. Needham, 29 Ia. 249; Cawing v. Allman, 71 N. Y. 435; Lancaster v. Woodard, 18 Pa. St. 357; Down v. Halling, 4 B. & C. 330; s. c., 6 D. & R. 455; s. c., 2 C. & B. 11.

ELLISON, J.—Plaintiff claiming to be the innocent indorsee of a check drawn by defendant for $545, brought this action thereon against him. The judgment in the trial court was for defendant.

The question for decision is, whether plaintiff is an innocent purchaser of the check. The check was drawn August 2, 1897, by defendant on a bank in Kansas City, Mo., where he resides, and made payable to a party in New York City, to whom it was sent by mail. It was received by the New York party on August 5, and on that day it was indorsed by the payee to one Jacobs, of Philadelphia, who held it until August 31, when he indorsed it to the plaintiff, a banking concern with which he did business, and which usually cashed his checks received by him from others. The plaintiff bank on the same day forwarded the check to Kansas City through its corre-

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spondent in New York City for presentment and payment. It was presented at the Kansas City bank on September 2, and payment was refused by order of the defendant.

Bank checks are negotiable instruments even though not expressed to be for value received as is required of negotiable promissory notes. Burns v. Kahn, 47 Mo. App. 215; Shoe Co. v. Crosswhite, 124 Mo. 34. But they are not intended for general circulation and in this respect and some others present points of difference from negotiable notes or bills of exchange. "A check, unlike a bill of exchange is generally designed for immediate payment, and not for circulation, and therefore it becomes the duty of the holder to present it for payment as soon as he may, and if he does not he keeps it at his own peril." Daniels v. Kyle, 5 Georgia, 245.

A check should be presented in a reasonable time, and when no cause for delay appears, the next day after receiving is a reasonable time. Benjamin Chalmers on Checks, 268; Story, Prom. Notes, secs. 493, 494; 3 Kent, 83, 88; 2 Daniel's Neg. Inst., sec. 1590. If there is delay in presenting, the circumstances of such delay may vary this reasonable time. In some instances, where facts are in dispute, reasonable time is to be submitted to a jury. But where facts are undisputed, it is merely a question of law for the court. Loux v. Fox, 171 Pa. St. 68; Himmelman v. Hoteling, 40 Cal. 111; Walsh v. Dart, 23 Wis. 334. If a check is drawn upon a bank at the place where drawn it should be presented on or before the next day after it is drawn and delivered. But if drawn upon a distant bank, or upon a local bank to be sent to the payee at a distant place (as was the case at bar), then it should be forwarded for presentment and collection on or before the next day after it is received. It will be assumed that the drawer intended to give sufficient length of life to the check for it, in the usual course, to make the journey upon which he sends it.

But it is agreed all round that at some period of time it becomes a stale check and loses its negotiability, thereby let-

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ting in any defenses the drawer may have had against it, if it had remained in the hands of the original payee. Laber v. Steppacher, 103 Pa. St. 81.

In this case the check, as has been stated, was sent by the defendant drawee to a distant place—New York—and was received there without delay in due course. It was indorsed to Jacobs on the day it was received and he should, ordinarily, have forwarded it on the next day, at the latest, to Kansas City for presentment and payment. Instead of doing so, he retained it for twenty-six days, when he took it to plaintiff bank for negotiation. And plaintiff's taking it as indorsee did not have the effect of relieving it of the consequences (whatever they might be), of the delay up to that time. 2 Daniel Negotiable Inst., sec. 1595. No excuse appearing for the extraordinary delay, plaintiff must therefore be held to know that it had become non-negotiable by its staleness, and it should be so declared as a matter of law.

Fixing the time when a check should be considered stale and overdue has been a vexed question with the courts. Daniel, in the second volume of his work on Negotiable Instruments, section 1634, says: "The certain age at which a check may be said to be stale is as uncertain as the fixing of the day on which a young lady becomes an old maid." It seems however that if some conceded rules are carried to their logical result more definite and uniform conclusions can be drawn. A check, save in exceptional instances, caused by circumstances out of the ordinary, is at best, a short-lived paper. If drawn on a local bank and there delivered it must, as we have already said, be presented by the close of the next day else it will be held at the risk of the holder. If drawn on a local bank and sent by the drawer to a distant place it must be started on its return for presentment by the end of the next day after it has been received, else it will again be retained at the risk of the holder. In such instances it becomes the check of the holder more than that of the drawer and so it ought to be

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regarded by the indorsee thereof. It has been shorn of important elements it originally possessed. So therefore when it is found to be outside these conditions I think it should be regarded as overdue.

In this case, plaintiff was bound to know that by holding the check beyond the time for it to be sent to Kansas City for payment Jacobs had taken upon himself the risk of the continued solvency of the bank on which it was drawn, for if it became insolvent the defendant would be discharged on account of the negligent delay. Plaintiff was therefore chargeable with notice that the check had been unclothed of some of its important characteristics which it possessed when issued. It had lost its principal negotiable elements, i. e. the right to be freed of defenses by the drawer. It was, therefore, clearly in the condition of a note overdue.

But conceding that it is going too far to say that thus retaining a check, without excuse, into a period of negligence of itself renders it stale or overdue, we have no hesitation in stating the law to be that when this negligent delay has reached the period shown here of twenty-six days, when three or four days would have been amply sufficient for its return to Kansas City, it has gone to the extent of rendering the check overdue as a matter of law.

There are cases to be found where a number of day's delay in the process of collection beyond the day following the receipt of a check, have been held not to dishonor it. But in most of these there were exceptional circumstances governing them. For instance, in the case of Estes v. Shoe Co., 59 Minn. 504, a check drawn in St. Paul, Minnesota, on a local bank was negotiated by the payee to one without notice six days thereafter in Denver, Colorado, and the court held it was not overdue and that equitable defenses could not be made by the drawer. But in that case it was understood the check would not be presented at once. The drawer of the check gave it to the payee with the understanding that he was to use

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it for the purpose of obtaining money in his travels in the west. The same may be said of the case of Woodruff v. Plant, 41 Conn. 344, where three days had elapsed before presentment; but the drawer knew it was to be sent away as a remittance. The case of Herider v. Phoenix Loan Ass'n, decided by us at this term, is, in some respects, one of like kind.

2. Being an overdue instrument in the hands of plaintiff, the further question arises as to whether defendant has a defense thereto; and in this respect it is sufficient to show that it was without consideration in the hands of the original payee and should have been returned by him to the defendant, the original object in drawing it having failed of its purpose.

It follows therefore that the judgment of the trial court should be affirmed. All concur.

EUGENE HOWARD, Respondent, v. VAUGHAN-MONNIG SHOE COMPANY, Appellant.

Kansas City Court of Appeals, January 8, 1900.

1. **Master and Servant:** CONTRACT: DISCHARGE: EVIDENCE. The evidence is reviewed and found to show a contract for a year with a privilege of discharging a servant on two weeks' notice, and discharge without such notice was unlawful and entitled the servant to recover for the balance of the year.

2. ———: DISCHARGE: ISSUE: INSTRUCTIONS. On the evidence and instructions it is held that the theory of the plaintiff was that he was entitled to two weeks' notice and that of the defendant that plaintiff was subject to discharge without such notice.

3. ———: ———: EVIDENCE OF EMPLOYMENT: MITIGATION. One employed for a definite period and wrongfully discharged prior to its expiration should accept similar service and his earnings will mitigate the damages, but the servant is not compelled to accept an offer from his former master in such way as would operate an abandonment of his rights under a former contract; and evidence on such offer and refusal to accept, is properly refused.

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4. ——: EVIDENCE: HEARSAY. Though a fact within the knowledge of a witness may in itself be material, it will not authorize the introduction of a mass of hearsay intermingled with it in the same answer and the whole should be ruled out together.

5. Practice, Trial: REMARK OF COURT: EXCEPTION. Where no objection or exception is taken at the time to the remark of the court in striking out certain inadmissible evidence, harm can not be said to result from such remark.

Appeal from the Cole Circuit Court.—*Hon. D. W. Shackleford*, Judge.

AFFIRMED.

F. M. Brown and *Edwin Silver* for appellant.

(1) The court erred in refusing to permit defendant (on plaintiff's cross examination as a witness) to show, that shortly after his dismissal from defendant's service it offered to take him back for the additional two weeks claimed by him. This was competent in mitigation of damages. Bigelow v. Powder, 39 Hun. 599; Mitchell v. Toale, 27 S. C. 238. (2) The court further erred in striking out at plaintiff's request, the testimony of the witness, Monnig, that he saw plaintiff and one Walsh in a fist fight within the penitentiary, and just outside of defendant's office. Pope v. Lathrop, 46 N. E. Rep. (Ind.) 154. (3) An instruction is erroneous which puts to the jury hypothetically facts of which there is no evidence. McAtee v. Valandingham, 75 Mo. App. 45; Stokes v. Distillery Co., 64 Mo. App. 420; Benjamin v. Railway, 50 Mo. App. 602; Cottrell v. Spiess, 23 Mo. App. 35; Craighead v. Wells, 21 Mo. 404; State ex rel. v. Hope, 102 Mo. 410; Gorham v. Railway, 113 Mo. 409; Stone v. Hunt, 114 Mo. 66. (4) Where two or more instructions are inconsistent, the judgment will be reversed. Legg v. Johnson, 23 Mo. App. 590; Stone v. Hunt, 94 Mo. 475. (5) So an instruction intrinsically inconsistent is erroneous. Wood v. Steamboat, 19 Mo. 529; Seymour v. Seymour, 67 Mo. 303. (6) So instructions are erroneous if

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not set forth in plain and unambiguous language. Young v. Ridenbaugh, 67 Mo. 574; State v. Pettit, 119 Mo. 410; Legg v. Johnson, 23 Mo. App. 590.

Edwards & Edwards for respondent filed an extended argument.

ELLISON, J.—This action is for breach of contract of hiring. Plaintiff recovered in the trial court.

Since the verdict was for plaintiff, we will assume the facts to be as the evidence in his behalf tends to prove them. Defendant is engaged in the manufacturing of shoes in the state penitentiary at Jefferson City and has in its employ a number of convicts as well as some others who are not convicts. Plaintiff was of the latter class and was engaged by defendant to work for it as a "treer" for a short period on trial, to ascertain if his work was satisfactory; and if it was, he was to continue in defendant's service for one year at a salary of $15 per week with the privilege of discharging him, by giving two weeks notice, if the performance of his services should prove unsatisfactory. The probationary service began in the first part of April and being satisfactory to defendant, after a test of two or three weeks, the engagement was made final under the terms just stated. Plaintiff worked until November 20, following when defendant without stating any cause and without giving any notice discharged him against his protest, he claiming he had not received notice as agreed upon. Several days after his discharge defendant offered to let him return to work for a period of two weeks and he rejected the offer. He recovered judgment for the period between November 20 until the end of the year at the rate of $15 per week, less $25 he earned in the meantime at other employment.

Defendant's answer admitted the employment but denied it was for a year or that plaintiff should have had two weeks notice before discharge, or that his work was satisfactory to defendant, and alleged that the employment was by the week

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and claimed the right to discharge plaintiff at the time it did. The answer did not allege any cause for plaintiff's discharge.

Plaintiff asked one general instruction, which was given, and defendant asked three, which were also given. The instruction for plaintiff is objected to but we find that it fairly covers plaintiff's case as made out by the evidence in his behalf and hence approve it. The objections made to it will be embraced in what follows as to the evidence generally.

Defendant says that the evidence does not tend to show that plaintiff was first to work on trial and then, if satisfactory, to be engaged for one year. And that the instruction contained two opposite theories, viz.: That plaintiff was hired for a year and that he had been discharged without giving him two weeks notice. The objection is not sound in the view we take of the contract as made out by plaintiff's testimony. That testimony is awkardly given, but we can not disregard it for that reason, if it shows under fair and reasonable interpretation what is meant. Without giving the language, our interpretation of the contract is that it was for a year's employment, if plaintiff's work continued to be satisfactory, at the rate of $15 per week, with the privilege of discharge, if the work was unsatisfactory, by giving two weeks notice; but the engagement was not to be binding until plaintiff had served a short time in order that defendant might ascertain if he was the sort of man it wanted. We think the record shows that defendant's counsel and officers so understood it. Defendant's superintendent, who hired plaintiff, says he told plaintiff that he would not think of hiring him "without giving him a trial." He answered the following questions asked by defendant's counsel: "Q. You heard Mr. Howard's testimony here that you were to hire him for a year; that you were to give him two weeks' notice in case of discharge? Did you so hire him? A. I did not. Q. On what terms did you hire him? A. I hired him simply at $15 a week to come to work there. And

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if his work was satisfactory naturally he would hold his job. Q. What was your custom in regard to hiring? A. I hired men just by the week."

This discloses that it was understood at the trial that one side was showing a year's hiring, with privilege of discharge on two weeks' notice, and the other, that it was merely a hiring by the week. So an instruction was given at defendant's instance which submitted the hypothesis of defendant's agreeing to give two weeks' notice.

It is urged by defendant that since plaintiff, at the time, put his objection to being discharged solely on the ground of not having received the two weeks' notice, he can not afterwards change front and put his case on any other theory. If we concede defendant's authorities in support of this proposition are applicable to this case in a proper state of evidence, we think the evidence as preserved will not justify their application. Plaintiff testified that defendant's superintendent handed him his pay envelope with the statement that they would "have to part company;" that plaintiff replied: "that is hardly the agreement. And he says, 'how is that?' I says, 'when you hired me you agreed you would give me two weeks' notice.' He says: 'I don't remember it.' I says, 'I do remember it distinctly.' He says: 'I'll give you another week's pay.' I says, 'no, sir, don't my work suit you?' He says: 'I'll give you a good recommendation.' I says, 'I want my two weeks' pay, or two weeks' notice.' And he says: 'get what things belong to you;' and I walked out." Here defendant assigned no cause for the discharge and plaintiff realizing that under the contract he had not the right in any event to discharge without the two weeks' notice reminds him of that fact, and asks him if his work is not satisfactory, and then receiving the evasive answer from the superintendent he claims his right to the notice agreed upon. Certainly there was nothing in this to show that plaintiff abandoned or waived the remainder of his contract. According to this testimony of plaintiff, which we

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accept as true, the superintendent did not treat him candidly. He did not tell him the cause of his discharge and was evidently asserting an absolute right of discharge, a right claimed by him at the trial.

But besides the foregoing, defendant, by raising the point now, is endeavoring to shift the ground here from that taken at the trial. All of its instructions were given, and no such hypothesis was submitted. They are as follows:

"1. The court instructs the jury that if the defendant employed plaintiff simply by the week and without agreement to give him two weeks' notice in case of dispensing with his services, and on so dispensing with said services paid plaintiff all that was owing him up to that time, then plaintiff can not recover in this action.

"2. The burden of proof is on the plaintiff to establish by the greater weight of the evidence to the satisfaction of the jury the alleged agreement or contract with defendant relied on by plaintiff as grounds for recovery in this action.

"3. The court further instructs the jury that if plaintiff disobeyed reasonable and proper orders relating to his work or conduct as defendant's employee, and was discharged because of such disobedience, then plaintiff can not recover in this action."

As has been before stated, a few days after plaintiff was discharged defendant offered to allow plaintiff to return to work for two weeks, and to pay him for that time if he would so return, but not otherwise. Evidence of this was ruled out by the trial court. Defendant claims it should have been heard in mitigation of the damages. We think the ruling was proper. Ordinarily, one hired for a definite time and wrongfully discharged prior to that time, should accept an offer to do similar work and his earnings will mitigate the damage. But where the offer of opportunity to so work is made by the wrongdoer in such way, or under such circumstances that its acceptance would force an abandonment of his rights

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under his contract of employment, he is under no obligation to accept. If plaintiff had accepted this offer at that time and under those circumstances, it would have been an abandonment of his right to a year's employment if his work was satisfactory. It would have amounted to a compromise of the matter by mutual concessions—defendant conceding that he should have two weeks' notice and plaintiff conceding that he could be rightfully discharged on such notice, notwithstanding he performed his work satisfactorily.

While defendant's statement of the contract was that the hiring was by the week, with a right of discharge at any time, it claimed that plaintiff justified the discharge by a disobedience of orders in holding communication with another department of the work, and finally engaging in a "fist fight" with the foreman. Plaintiff explained what communication he had, and why he had it, and the matter was submitted to the jury by defendant's third instruction above set out. But at one part of the examination of the defendant manager, in answer to the question whether he knew the cause of the discharge, the answer was of some length and consisted chiefly in hearsay. Indeed, the whole answer was hearsay, except a sentence in which he stated that he saw the fight. The answer was stricken out. Conceding the relevancy of the fact of plaintiff's engaging in a fight as showing such disorderly conduct as to justify his discharge, it is sufficient to say that the witness, who was defendant's general manager, had no right to mingle the statement in with a lot of other clearly irrelevant and hearsay matter. But be this as it may, the whole subject was afterwards admitted in evidence disentangled from hearsay and was fully put before the jury. After ruling on the verbal motion to strike out the answer, and after defendant's exception, the court remarked that it was "collateral matter." No objection or exception was taken to the remark, and in view of the fact that it got to the jury we can not see where any possible harm could result from the remark. It not only was put before the

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jury but under a direct ruling by the court on plaintiff's motion that it be stricken out.

We have gone carefully over the record, perhaps considering some matters of objection not justified by the answer, and finding no error materially affecting the merits of the case we affirm the judgment. All concur.

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82 412 f84 432 85 150 GEORGE KAUTSCH, Plaintiff in Error, v. BEN H. DROSTE et ux, Defendants in Error.

Kansas City Court of Appeals, January 8, 1900.

1. **Final Judgment:** DEMURRER: WRIT OF ERROR. To a bill in equity seeking specific enforcement of a contract to give a mortgage, a demurrer was sustained, and the judgment recited that the plaintiff elected to stand on his petition and proceeded to give him judgment on the notes declared on in the petition. The motions for new trial and in arrest struck at the court's action on the demurrer. Held, that the judgment on the demurrer was not a final judgment and that a writ of error would not lie to review such action of the court.

2. ———: ———: ———. If a judgment on a demurrer further decrees that the plaintiff take nothing by his writ, etc., it becomes a final judgment and may be reviewed by appeal or writ of error without motions for new trial or in arrest or bill of exceptions.

Error to the Cole Circuit Court.—*Hon. D. W. Shackleford*, Judge.

WRIT DISMISSED.

Edwards & Edwards for plaintiff in error filed brief on merits.

Pope & Belch for defendants in error.

(1) If there was no judgment the writ of error should be dismissed. Spears v. Bond, 79 Mo. 467; Berry v. Zim-

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merman, 43 Mo. 215; Robinson v. Morgan Co., 32 Mo. 428; Palmer v. Crane, 8 Mo. 619; Sater v. Hunt, 61 Mo. App. 228.

SMITH, P. J.—This is a suit in equity to compel the specific performance of an alleged verbal contract, entered into between the plaintiff and defendants, whereby the latter agreed, in consideration of the loan to them by the former of the sum of $775, to execute and deliver to such former a mortgage on certain real property to secure the payment of the money so loaned, etc. The defendants interposed a demurrer to the plaintiff's petition, which was by the court sustained.

The judgment was to this effect: "It is ordered and adjudged that the said demurrer be sustained and the plaintiff be denied a judgment enforcing the specific performance of the contract set forth in his said petition or judgment, a lien against the property therein described and the said plaintiff elected to stand on said demurrer and refusing to further amend his said petition, but it appearing to the court that the plaintiff is entitled to a judgment on the notes sued on, it is therefore ordered and adjudged that the plaintiff have and recover from the defendants herein the sum of $1,114.46, the amount ascertained to be due from defendants to plaintiff from an inspection of the instruments sued on, and that he have hereof execution, to which action of the court in sustaining the demurrer and refusing to enforce a lien or requiring defendants to specifically perform the contract sued on, plaintiff at the time duly excepted."

Afterwards, the plaintiff filed a motion to set aside the judgment sustaining the defendants' demurrer, and for a new trial, and also a further motion to arrest the said "judgment sustaining the said demurrer, in so far as it denied to the plaintiff the enforcement of the contract sued on, and the enforcement of the lien against the property for the debt due from the defendants to the plaintiff." These motions were severally overruled; and thereupon the plaintiff tendered his

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bill of exceptions, which was duly allowed, signed, sealed and made a part of the record. The cause is brought here by writ of error.

The defendants object that a writ of error will not lie from the judgment on the demurrer, for the reason that such judgment was not a final disposition of the case. It will be seen from the recitals therein that the plaintiff did not stand on his demurrer and permit the court to dismiss his petition and discharge the defendants, but, on the contrary, he elected to take a judgment on the notes for the amount of the principal and interest due thereon. It is true that there is a final judgment on the notes sued on, but from that judgment there is no pretense that the writ of error is prosecuted. The motions to set aside, and in arrest of the judgment extended only to the action of the court on the demurrer, and therefore the judgment on the notes, which is the only final judgment in the case, was not drawn in question by either of said motions. The plaintiff does not, and can not, of course, complain of the action of the court in giving him judgment on the notes. The correctness of the action of the court in that regard is not questioned, and yet this is the only final judgment in the case. The plaintiff seeks to have reviewed only the action of the court on the demurrer.

According to the well established precedents, the action of the court in sustaining the demurrer was not a final judgment thereon. A judgment on a demurrer to be final should be to the effect: "Therefore it is considered that plaintiff take nothing by his writ, etc., and that the defendants go thereof without day, etc." Palmer v. Crane, 8 Mo. 620. An appeal or writ of error lies only from a final judgment. R. S. sec. 2246; Holloway v. Holloway, 97 Mo. 639; Mills v. McDaniels, 59 Mo. App. 331. They will not lie from a judgment overruling or sustaining a demurrer. The judgment must be final on the demurrer. Spears v. Bond, 79 Mo. 467; Berry v. Zimmerman, 43 Mo. 215; Robinson v. County

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Court, 32 Mo. 428. A writ of error to be effective must operate upon a final judgment. The writ here operates only on the judgment on the demurrer and as that was not a final judgment it was therefore ineffective. As already stated, the final judgment is not sought to be affected by the writ. And since a case can not be divided into parts and brought up in fragments, it must follow that the writ can not affect the judgment on the demurrer—it not being a final judgment, Anderson v. Moberly, 46 Mo. 191.

If the plaintiff had suffered a final judgment to have been given on the demurrer an appeal or writ of error would have lain. Neither of the motions, nor the bill of exceptions filed would have been necessary to have invested the supervisory court with jurisdiction to determine the questions raised by the demurrer. Barber Asphalt Co. v. Benz (decided by us at present term). But as no objection was taken to the final judgment by either of the said motions they were entirely useless in the case.

It may be, though we would not be understood as so deciding, that the supposed equities alleged in the plaintiff's petition were not foreclosed by the judgment of the court sustaining the demurrer, and that the only effect of the suit was to merge the notes into a judgment at law leaving the equities between the parties, if there were any such equities, precisely as they existed at the time of the commencement thereof. But however this may be, we are at present without jurisdiction to go further than to determine that the writ was improvidently sued out and has brought nothing before us for review, and therefore it must be dismissed. All concur.

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MARTHA CATRON'S ESTATE.

Kansas City Court of Appeals, January 8, 1900.

1. **Wills**: CONSTRUCTION OF: INTEREST ON LEGACY: ANNUITY. The general rule that interest is not payable on a legacy until one year after the death of the testator does not apply where the legacy consists of the net interest or income of a given sum. The interest being the legacy itself is collectible from the death.

2. ———: ———: ———: CONTEST: ESTOPPEL. A legatee whose legacy consists of interest on a given sum is not estopped to collect such sum by reason of the fact that he contested the will. Such estoppel, if allowable at all, could only apply to the interest on such interest for the time the contest delayed payment.

3. **Appellate Practice**: NO OBJECTION BELOW: TOO LATE ABOVE. Where an appellant fails to call the attention of the trial court to an excess in its finding, it can not raise such question in the appellate court.

Appeal from the Lafayette Circuit Court.—*Hon. Richard Field*, Judge.

AFFIRMED.

John E. Burden for appellant.

(1) Executors and administrators shall not be compelled to make distribution or pay legacies until one year after the date of the letters, unless the legacies specified would be perishable or subject to injury if retained one year. R. S. 1889, secs. 237, 238; Way v. Priest, 13 Mo. App. 555; s. c., 87 Mo. 180; Powell v. Palmer, 45 Mo. App. 243. (2) No interest can accrue upon a legacy until it becomes by law the duty of the executor to pay the legacy. Bradner v. Faulkner, 12 N. Y. 472; Welsh v. Brown, 14 Vroom. 43; N. J. L. 37; Bartlet v. Slater, 53 Conn. 102; s. c., 55 Am. Rep. 73; Lewis v. Carson, 16 Mo. App. 361; Way v. Priest, 13 Mo. App. 555;

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Thorn v. Garner, 113 N. Y. 198; Howard v. Francis, 3 Stew. (30 N. J. Eq.) 444; Clarke v. Sinks, 144 Mo. 448; Halsted v. Meeker's Executors (3 C. E. Green), 18 N. J. Eq. 136. (3) The time for the payment of the legacy was postponed by the action of Frances Evaline McFadin, brought within the first year of administration, contesting the will of her mother, Martha Catron, deceased. Interest will not commence to run in favor of a legatee until the contest over the will is determined. State ex rel. v. Adams, 71 Mo. 620; Vandergrifts Appeal, 80 Pa. St. 116; Trustees, etc., v. Morris, 36 S. W. Rep. (Ky.) 2; Commonwealth v. Turley Ex., 4 Bush. (Ky.) 399. "The action of the probate court becomes wholly void by such contest, so far as the efficacy of the will is concerned." Lamb, Adm'r, v. Helm, Adm'r, 56 Mo. 432. (4) Until the $5,000 legacy was paid over by the executor to the trustee of Frances Evaline McFadin, there was no fund to produce interest. The only interest to be paid to Mrs. McFadin is the interest derived from the investment of the money received by the trustee from the executor. Paul v. Williams, 13 N. Y. Supp. 701; Welsh v. Brown, 14 Vroom. 43 N. J. L 37; 2 Rop. on Leg. 877.

William Aull for respondent.

(1) The income of five thousand dollars, a designated portion of the estate, is by the will bequeathed to the respondent Frances Evaline McFadin for life and this income constitutes her legacy. There is no question of interest upon a legacy in this case and she is not asking for interest upon her legacy, but is asking for, and the lower courts gave her, her legacy itself. The income is her legacy and not interest on her legacy. Matter of Stanfield, 135 N. Y. 292; Cooke v. Meeker, 36 N. Y. 15; Pierce v. Chamberlain, 41 How. Pr. 501; Matter of Lynch, 52 How. Pr. 367; Powers v. Powers,

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16 St. Rep. 770; Barrow v. Barrow, 29 St. Rep. 240; Matter of Fish, 19 Abb. Pr. 209; Craig v. Craig, 3 Barb. Ch. 76; Hilyards Estate, 5 W. & S. 30; Eyre v. Golding, 5 Binn. 472; 2 Woerner's Am. Law of Adm. [2 Ed.], sec. 1006; Bartlett Petitioner, 163 Mass. 509, sec. 521. (2) Where the income of a designated portion of an estate is given to a legatee for life, such legatee becomes entitled to whatever income accrues thereon from and after the death of the testatrix, and the legatee may require the executor to account to her from that time. Matter of Stanfield, 135 N. Y. 292; Cooke v. Meeker, 35 N. Y. 15; Pierce v. Chamberlain, 41 How. Pr. 501; Matter of Lynch, 52 How. Pr. 367; Powers v. Powers, 16 St. Rep. 770; Barrow v. Barrow, 29 St. Rep. 240; Matter of Fish, 19 Abb. Pr. 209; Craig v. Craig, 3 Barb. Ch. 76; Hilyard's Estate, 5 W. & S. 30; Eyre v. Golding, 5 Binn. 472; 2 Woerner's Am. Law of Adm. [2 Ed.], sec. 1006; Bartlett Petitioner, 163 Mass. 509, 521. (3) Where a residue of an estate or an aliquot part thereof, or a particular fund severed from the bulk of the estate, or the interest, or income thereof, is bequeathed to one for life, remainder over, and no time fixed for the commencement of the interest or enjoyment, it is established that the life tenant is entitled to the actual income thereon from the death of testator. 13 Am. and Eng. Ency. of Law [1 Ed.], p. 190; Townsend's Appeal, 106 Pa. St. 268; Flickwir's Estate, 136 Pa. St. 374; Pell v. Mercer, 14 R. I. 412-432; Lovering v. Minot, 9 Cush. 151; Pittman v. Johnson, 35 Hun. 38; Green v. Blackwell, 32 N. J. Eq. 768-773; Van Blarcom v. Dager, 31 N. J. Eq. 7, 183-195; Ayer v. Ayer, 128 Mass. 575; 13 Am. and Eng. Ency. of Law, p. 190, sec. 5; 2 Williams Executors [7 Eng. Ed.], 1391 [7 Am. Ed.], p. 741; Angerstein v. Martin, I. T. & R. (Eng.), 232; Hewitt v. Morris, I. T. & R. 241; Pickwick v. Gibbs, 1 Beav. 271; La Tornier v. Bidmer, 2 Sim. (Eng.) 18; Douglas v. Congrove, 1 Keen (Eng.) 410; Dimes v. Scott, 4 Ruse (Eng.) 195; Taylor v. Clark, 1 Hare (Eng.) 161; MacPher-

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son v. MacPherson, 1 Macg. H. L. (Eng.) 243; Brown v. Gelatly, L. R. 2 Ch. App. (Eng.) 751; Well v. Putnam, 70 Me. 209; Minot v. Thompson, 106 Mass. 583; Sargeant v. Sargeant, 103 Mass. 297-299; Pollock v. Larned, 102 Mass. 49-54; Bradlee v. Andrews, 137 Mass. 50; Lovering v. Minot, 9 Cush. (Mass.) 151; Treadwell v. Cordes, 5 Gray (Mass.), 34; Healey v. Toppan, 45 N. H. 243; Guthrie v. Wheeler, 51 Conn. 207; Lawrence v. Company, 56 Conn. 423-439; Pell v. Mercer, 14 R. I. 412-432. (4) Where no trustee has been appointed it is the duty of the executor to hold the fund and to pay the income from time to time to the life legatee. Carson v. Carson, 6 Allen (Mass.) 397-399; Dorr v. Wainright, 13 Pick. (Mass.) 328-331; Dale v. Johnson, 3 Allen (Mass.) 364-367; Claggett v. Hardy, 3 N. H. 148; Wheeler v. Perry, 18 N. C. 148; Davis v. Crandall, 101 N. Y. 311.

GILL, J.—This is an appeal from a final order of distribution made in the estate of Mrs. Martha Catron, who died in Lafayette county in March, 1891. At the date of her death Mrs. Catron left an estate valued at about $100,000, and consisting of both real and personal property. She had only two children—James H. Catron and Mrs. Frances Evaline McFadin, and both living separate and apart from their mother. The deceased left a will by which she set apart and gave to her daughter, Mrs. McFadin, during her life, the net interest or income from $5,000 which was directed to be loaned by a trustee, and which at the death of Mrs. McFadin was to vest absolutely in her children. The entire remainder of the estate was devised and bequeathed to said James H. Catron, son of the deceased.

Shortly after the decease of Mrs. Catron, and before the trustee had taken charge of the $5,000, the income of which was to go to Mrs. McFadin, the latter commenced a suit to contest the will, and on the ground of the alleged incapacity of the testatrix and undue influence exercised over her by

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James H. Catron, the principal legatee. This litigation was protracted through a series of years, was twice in the supreme court (120 Mo. 252 and 138 Mo. 197), terminating however in June, 1897, in the establishment of the will.

In the beginning of this litigation, the probate court, as the statute provides in such cases, appointed J. Q. Plattenburg administrator *pendente lite* of the estate of Mrs. Catron. Said administrator took charge of the assets and under the direction of the court so managed and loaned the funds, that on his final settlement, and turning back of the estate into the hands of the executor in October, 1897, there was a net gain or increase thereof of $5,448.83. Shortly thereafter the executor made final settlement, reporting the money and assets received from the administrator *pendente lite*, and the probate court proceeded to make final distribution, ordering the net balance of money on hand to be paid out as follows:

"To the trustee of Mrs. Frances Evaline McFadin and her heirs the sum of..........$ 5,000.00

"To Mrs. Frances Evaline McFadin the interest accumulated on said sum during the pendency of the suit contesting the will of deceased, after paying the taxes and costs, the sum of $1,564.50

"To James Henry Catron, residuary legatee, the sum of..............................$21,155.25"

From this order the executor and James H. Catron, residuary legatee, appealed to the circuit court, where the judgment of the probate court was affirmed, and said parties then appealed to this court.

1. In addition to the foregoing, it is proper to state, that before the trial in the circuit court, the executor paid over the $5,000 to the trustee of Mrs. McFadin and her children, leaving as the sole matter in controversy, the $1,564.50 which the probate court directed to be paid to Mrs. McFadin as the net "interest accumulated on said sum ($5,000) during the pendency of the suit contesting the will of deceased."

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There is a general rule in the distribution of general legacies that interest thereon will not be allowed for the first year after the death of the testator. The reason for this rule is that such legacies are not ordinarily due or payable until after the year—that time being given to the executor to inform himself of the condition of the property and be prepared for such payments. Analagous to this our statute of distributions provides that executors shall not be compelled to pay legacies until one year after the date of letters of administration. On the basis, now, of this doctrine the executor and residuary legatee contend that Mrs. McFadin is not entitled to the interest that accrued and accumulated on the $5,000 legacy carved out of Mrs. Catron's property. It is, in effect, claimed that the trustee had no right to call for said legacy until the expiration of the year—that it was not payable until after that time, and hence no income or interest could be rightfully claimed as arising from the $5,000 during that period. And further it is insisted that Mrs. McFadin had no right to interest on the money (the income of which was bequeathed to her) even after the year had gone by and while she was attacking the will by a pending suit.

On the other hand, counsel for Mrs. McFadin take the position that under the will of her mother, said Mrs. McFadin became entitled to the income or profit arising from a designated portion of the estate; that this income was her legacy, and that the executor had no greater right to take said income or any part thereof from her than to appropriate said $5,000 bequeathed to her children.

Counsel for both sides have furnished exhaustive briefs, citing numerous authorities, the most satisfactory of which we proceed to notice. Eyre v. Golding, 5 Binn. 472, was a case very similar to this. Mrs. Golding's father died leaving her by will the annual interest of a certain sum taken from the estate, said interest to be paid during the life of the legatee, and at her death the principal sum to be equally di-

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vided between her children. The executor refused to pay the interest accruing the first year, and on a suit brought therefor by Mrs. Golding she was allowed to recover. After stating the general rule, that where a pecuniary legacy is given with no time of payment mentioned, it is not payable till the end of a year from the death of the testator, nor carry interest until after the first year, Tilghman, C. J., proceeds to say, that to this rule there are exceptions, naming among these the legacy to a child the support of which is not provided for, and where it will be understood that interest will be allowed from the death of the testator. "The devise in the present instance," says the learned judge, "is not of a gross sum, but in the nature of an annuity. There is a difference between a legacy of a sum of money to one for term of life, and a bequest of a sum to be paid annually for life. In the former case, the legacy, not being payable till the end of a year from the testator's death carries no interest for the year. But in the latter, the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death, or the legatee will not receive the annuity annually during her life."

In re Hilyard's Estate, 5 W. & S. 30, decided by the same court, is still more in point. Hilyard gave unto his executors the sum of $10,000 in trust, to be put at interest on good security, with instructions "to pay and apply the interest and income thereof, from time to time, when as the same shall be got in and received, unto my sister Keziah Tomlinson for and during all the term of her natural life," and at her death said sum of $10,000 to be equally divided between the children of the testator's brother, etc. It was there held that the sister, Keziah, was entitled to the interest growing out of and accruing on said $10,000 from the date of the testator's death. The court there adopted practically the same views

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as announced in the case reported in 5 Binney. "Interest," says the court, "is in its nature an annual profit."

In Ayre v. Ayre, 128 Mass. 575, the same principle was involved. In that case the testator by his will gave to his brother a fund, the income of which was to go to him during his life and at his death said fund to pass to his children; and it was there held that the said brother was entitled to the income of the fund from the death of the testator. It was said that, "The general rule of law is well established that a tenant for life is entitled to the income of a fund set apart for his benefit from the time of the testator's death."

In Flickwirs' Estate, 136 Pa. St. 374, the provision of the will read: "I give and bequeath to my executors here inafter named" (certain sums of money differing in amount to different persons) "in trust, nevertheless, to pay the interest and income to A. B. for life, and at her death to pay the principal to C. D.," etc. The syllabus which is supported by the text of the opinion, declares that, "the rule that interest upon legacies does not commence to accrue until one year after the death of the testator, being one of administrative convenience only, gives way at all times to the testator's intent, whether expressed, or whether implied from the general scheme of the will or from the situation of the legatee, etc. There is no substantial difference, in legal aspect, between the gift of an annuity for life, and one of the interest or income of a fund for life; nor between the gift simply of interest, and that of interest payable annually; in all these cases, if no actual intent to the contrary appears, the annuity, interest, or income commences to accrue to the legatee at the death of the testator."

To same effect is Townsends' Appeal, 106 Pa. St. 268, where conceding the general rule to be "that pecuniary legacies are not payable until a year after the testator's death, and in the meantime do not bear interest," yet states that, "to this rule there are some well recognized exceptions, such as a

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legacy by a parent to the child, or by one *in loco parentis*, by way of maintenance, where the possession of the principal is deferred; * * * and also where interest in the nature of an annuity is given, if by implication from the terms of the instrument, the legacy is given for support."

In the opinion last referred to, Cooke v. Meeker, 36 N. Y. 15, is cited. That case is perhaps more frequently mentioned than any other bearing on the question. And although criticised by some courts, it deserves, in my opinion, to be classed as a very sound exposition of the law. It would extend this opinion beyond reasonable limits to state the force and breadth of that opinion. After a full review of the authorities it is there declared, "that when a sum is left in trust, with a direction that the interest and income should be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death."

The New York court of appeals in another and later case —Matter of Stanfield, 135 N. Y. 292—followed the line of the foregoing authorities, and decided, in a case similar to the one at bar, that the life legatee was entitled to the interest accruing or accumulating from the death of the testator. "Where," says the court, "the income of an estate, or of a designated portion, is given to a legatee for life, we think it is clear that he becames entitled to it whenever it accrues; and if the estate is productive of income from the death of the testator, he can require the executor to account to him for the income from that time. The rule that general legacies shall not bear interest until the expiration of one year from the grant of letters testamentary, or of administration, has no application in such a case. It is, by its terms, limited to general legacies payable out of the corpus of the decedent's estate. In the present case (referring to the case then under consideration and similar to this) the bequest is not a part of the principal of the estate, or of any property possessed by the testator in his lifetime; but of that which is to arise or accrue

after his death from a specified fund to be set apart for that purpose. It is the income which constitutes the respondent's legacy. He is not seeking to charge the estate with interest upon his legacy, but is simply endeavoring to secure the legacy itself, and his effort, therefore, involves no infringement of the rule regulating the payment of interest upon general legacies." Among the numerous authorities examined and which sustain the foregoing, we call attention to Pierce v. Chamberlain, 41 How. Pr. (N. Y.) 501; Matter of Lynch, 52 How. Pr. 367; Green v. Blackwell, 32 N. J. Eq. 768; 2 Redfield on Wills, 472; 2 Woerner's Law of Adm. [2 Ed.], 1006.

From the reason and holding of these authorities we conclude that under the will of Mrs. Catron, her daughter, Mrs. McFadin, became at once, on the death of the testatrix, vested with an absolute title to whatever interest or net income thereafter arose from said $5,000. As well said by a *nisi prius* judge in one of the cases cited: "The donee of a sum in gross receives all that the donor intended, when he paid that sum at a time fixed for distribution; the donee of a yearly sum for life, or a less term, receives less if one year is cut out from the period. In the one case, interest is a mere adjunct to the legacy, and may be withheld without impairing the substance of the gift; in the other, interest is itself the legacy, and must be paid in full, or the legacy will be diminished."

The purpose at last in all such cases is to follow the will of the testator and to distribute the property according to the true intent thereof. In reading Mrs. Catron's will, we have no doubt that she intended that immediately upon her death Mrs. McFadin should receive, hold and enjoy for her maintenance and support the net profit, interest or income to be derived from the $5,000 set apart for that purpose. It seems that the testatrix had from time to time contributed to this daughter's support. The husband of the latter, it seems, was in rather poor circumstances financially, and not able likely

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to support his wife and family in the way desired by the testatrix. It was then the design of the will maker to add materially to the resources and secure a more comfortable support for her daughter than she could get from the limited income of the husband.

We have examined the authorities cited by the learned counsel for the executor and residuary legatee, and though some of them lend support to his contention, we yet think the weight of authority and the better considered cases are in harmony with the decision here reached.

2. We fail to discover wherein the case of State ex rel. Nichols v. Adams, 71 Mo. 620, applies to this controversy, unless it be to the point as to whether or not Mrs. McFadin is estopped to claim under the will of her mother, because she sought by a proceeding in court to have it set aside. As to that, the decision is clearly adverse to these appellants; it was there held that estoppel did not apply. If Mrs. McFadin was seeking to add interest to her income by reason of the non-payment thereof during the six years involved in the contest of the will, then it might be well said that she had no just claim for such interest because the delay in accounting to her was the result of her own conduct. But no such claim for interest upon interest is made here. She is contending only for the principal of her income and not for interest or damages for failing to pay it sooner.

3. The suggestion contained in appellant's reply brief that at all events the amount allowed to Mrs. McFadin by the lower court was in excess of what she is entitled to, comes too late. No such matter was complained of in the circuit court —in the motion for new trial or otherwise, and hence the objection can not for the first time be raised here. If the finding and judgment was excessive appellants should have made timely objection thereto so that the same could have been corrected in the lower court.

On the undisputed facts the judgment is for the right party and will be affirmed. All concur.

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HERIDER & HERIDER, Appellants, v. PHOENIX LOAN ASSOCIATION, Respondent. 82 427 f82 405

Kansas City Court of Appeals, January 8, 1900.

1. **Banks and Banking:** COLLECTION: CHECK: PRESENTATION: NEGLIGENCE. P. received a check drawn by the bank at S. On the same day in the usual course of business he deposited it with his bank at J. for collection. This bank on the same day in the usual course sent it to the bank at K., which received it on the next day and on the same day, but not in the usual course, forwarded it to the bank at M. twelve miles from S. This bank received it on the next day, Saturday, and mailed it back to the bank at K. where it was received on Monday and on the same day sent to S. But the bank at S. had closed on Saturday. Held, the bank at K. was negligent in first sending it to M. when the usual course had been to send direct to S., which it would reach nearly as soon as it would M. And the fact that the bank at K.'s correspondent at S. was suspected of being insolvent, and was in fact insolvent, and closed on the same day as the drawee bank, will not excuse the bank at K.

2. ———: ———: ———: NEGLIGENCE: DEFENSE. It is no defense to the above state of facts that each of the banks could under the law have retained the check until the next day, since the negligence consisted in sending it to the wrong place; and to excuse the negligence it must be shown that a person of ordinary prudence at S. after receiving the check on Saturday would not have presented it until the following Monday.

3. ———: ———: ———: ———. An agent receiving a check on a local bank for collection may delay the presentation until the next day; yet if he knows of the failing condition of the drawee bank he should proceed to present it at once and not wait until the time the law ordinarily allows.

4. ———: ———: ———: ———. Lack of diligence alone in collecting a check is not sufficient to fasten liability upon the agent, but such failure must be the cause of the injury.

5. ———: CHECKS: DISCHARGE OF DRAWER. Before the drawer of a check may be discharged from liability there must be an actual injury resulting from the neglect of the payee or his agent, and the payee has the right in the collection of the check to proceed in the customary way to collect the same.

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6. ——: ——: RETURN OF: PRACTICE. Where the drawee is insolvent and the check worthless, it is not necessary to return it to the drawer; and its retention indicates no intention of appropriation.

Appeal from the Saline Circuit Court.—*Hon. Richard Field*, Judge.

REVERSED AND REMANDED.

S. B. Burks and *Leslie Orear* for appellants.

(1) A check is designed for immediate payment. St. John v. Homans, 8 Mo. 382. The law does not permit any extension of the risk of the drawer by a series of transfers. Tiedeman on Com. Paper, sec. 443. It was the duty of the St. Joseph bank to send the paper to the place where the drawee bank was located for presentment. Dan. on Neg. Inst. [4 Ed.], sec. 1592; Tiedeman on Com. Paper, sec. 443; Boone on Banking, sec. 173. (2) Where the holder of a check has knowledge of the failing condition of the drawee bank, it becomes its duty to proceed at once to present such check for payment. Lagare v. Arcand, 9 Quebec Rep. 122. (3) If a bank in whose hands is placed for collection a check does not elect to use the day the law allows it to begin the process of collection, but forwards it the same day it is received, it may still be held to be negligent if it forwards the paper to the wrong party or the wrong place. Bank v. Bank, 71 Mo. App. 451. (4) The holder of a check can not recover from the drawer unless due presentment has been made to the payee bank and payment refused. Dan. on Neg. Inst. [4 Ed.], 1586; Tiedeman on Com. Paper, sec. 442; Boone on Banking, sec. 175; Am. and Eng. Ency. of Law [2 Ed.], 5-1040. In all Missouri cases presentment is contemplated as essential. St. John v. Homans, 8 Mo. 382; Morrison v. McCartney, 30 Mo. 183; Graham v. Morstadt,

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40 Mo. App. 333; Moody v. Mack, 43 Mo. 210; Bldg. Ass'n v. Zoll, 83 Mo. 94. (5) Where the holder of a check has treated the paper as his own by long delay in making demand, or by having the assignee of the failed bank allow a claim in holder's favor because of such check, the drawer can not be held. Shoe Co. v. Crosswhite, 51 Mo. App. 60.

Huston & Brewster, *O. M. Spencer* and *Ben. J. Woodson* for respondent.

(1) It is the universal rule that the payee of a check has a reasonable time in which to present the same for payment, and what is a reasonable time, depends largely upon the circumstances surrounding each particular case. Such reasonable time has, however, under ordinary circumstances, been definitely and universally fixed by the decisions. 2 Dan. on Neg. Inst. [4 Ed.], sec. 1592; Tiedeman on Com. Paper, sec. 443; Norton on Bills & Notes [2 Ed.], p. 391; 5 Am. and Eng. Ency. of Law [2 Ed.], p. 1042; Bank v. Bank, 80 Md. 480. To the same effect, and equally emphatic, are the following cases: Rosenthal v. Ehrlicher, 154 Penn. 396; Knott v. Venable, 41 Conn. 344; Loux & Son v. Fox, 171 Penn. 68; Holmes v. Roe, 62 Mich. 199; Griffin v. Kemp, 42 Ind. 172; Taylor v. Sipp, 30 N. J. L. 290; Bishop on Contracts, sec. 1438; 62 Mich. 199. (2) If appellants were not injured on account of respondent's failure to have the check presented for payment on Monday, December 17, then they can not be heard to complain. Morrison v. McCartney, 30 Mo. 187; St. John v. Homans, 8 Mo. 382; Graham, Ex'r v. Morstadt, 40 Mo. App. 333; 80 Md. 478; 46 Ind. 176; 2 Morse, Banks and Banking [3 Ed.], sec. 421; 5 Am. and Eng. Ency. of Law [2 Ed.], sec. 1044, and cases there cited. (3) The case of Shoe Co. v. Crosswhite, 51 Mo. App. 60, cited by appellants, was reversed in 124 Mo. 34.

ELLISON, J.—The plaintiffs reside and do business at Slater, Missouri, while defendant is a corporation doing busi-

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ness at St. Joseph, Missouri. Plaintiffs were agents for defendant at Slater, and claiming the sum of $174.93 as due them, they sued defendant for that amount. The judgment in the circuit court was for defendant.

The reason defendant refused to pay plaintiffs the sum stated is that it claim plaintiffs owe it the same amount. Plaintiffs claim they paid defendant that amount by check on the Slater Savings Bank, a banking institution doing business at Slater. Defendant claims that such check was received by it and forwarded to Slater in due and customary course for collection; but that before it reached Slater the Savings Bank upon which it was drawn, closed its doors and was utterly insolvent. The whole controversy relates to the question of negligence or diligence in presenting the check for payment.

In the various dealings between the parties plaintiffs had customarily remitted to defendant by their check on their local bank. The check in question was dated December 11, 1894, and was received by defendant on December 13, and was deposited with the German American Bank at St. Joseph for collection for defendant on the same day. And on the same day the German American Bank mailed it to the Metropolitan Bank at Kansas City, Missouri, for collection. It was received by the latter bank on the fourteenth, and on the same day mailed to the bank of Wood & Huston at Marshall, Missouri, a city about twelve miles from Slater. It was received by Wood & Huston on the morning of the fifteenth and on the same day mailed back to the Metropolitan Bank at Kansas City, and the sixteenth being Sunday, was received by the latter on the seventeenth. It was then, on the seventeenth, by a later mail, sent by the Metropolitan to Slater, it does not appear to whom. It reached Slater late on the seventeenth or on the eighteenth and was on the latter date presented for payment to the assignee of the Savings Bank, that bank having closed its doors finally at the end of business hours (5 o'clock) on Saturday the fifteenth.

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Defendant had customarily collected plaintiffs' checks by placing them in the German American Bank at St. Joseph, and that bank would transmit to the Metropolitan at Kansas City, and the latter would transmit to the Citizens' Stock Bank at Slater (the only other bank there) for presentment and collection. The reason the Metropolitan did not send to the Citizens' Stock Bank in this instance was that it suspicioned the solvency of that bank and it in fact did cease to do business on the same day with the Savings Bank. Slater is a town of about three thousand inhabitants and it is conceded that it had an express office doing business therein.

From the foregoing facts it is clear that the German American Bank at St. Joseph and the Metropolitan National Bank at Kansas City, each in turn, became the agents of defendant in the process of collection. Bank v. Bank, 71 Mo. App. 451; Daly v. Bank, 56 Mo. 94. If, therefore, the check was not paid through the negligence or lack of diligence of either of these banks, the loss should fall on defendant, since it was occasioned by the neglect of its agent.

It being the usual course, it was the duty of the bank at St. Joseph to promptly transmit to the bank at Kansas City which it did. It being the usual course, it was also the duty of the Metropolitan at Kansas City to diligently transmit to Slater for presentment and collection, and the decisive question in the case is whether it did fill the measure of its duty. If it did not, the loss, as just stated, is defendant's loss.

Instead of sending the check direct to Slater it sent it first to Wood & Huston at Marshall, a city twelve miles distant from that town. This, in the absence of directions to send a special messenger to Slater, involved at least one day's delay, in this case a fatal delay, for the check was received at Marshall on the morning of the fifteenth, the day the Savings Bank quit business at the close of business hours. If the check had been sent to Slater direct, it being on a railway line just beyond Marshall, it would have reached there nearly

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as early as it did Marshall, and the remainder of that day would have remained for presentment and payment. The case concedes that the Metropolitan had theretofore sent checks received from the St. Joseph bank direct to Slater. But in this instance, as we have stated, its reason for not following the usual custom was that it had a well grounded suspicion of the solvency of the Citizens' Stock Bank, its correspondent at Slater.

That may have been reason enough for not sending to that bank, but it was no excuse for not sending to some other person or institution at that town with directions to collect. It was shown that there was an express office there and doubtless in a town of that size more than one collecting agent. We, therefore, hold that the Metropolitan Bank was negligent in sending the check to Marshall instead of direct to Slater.

But defendant seeks to avoid the error of the Metropolitan Bank in sending the check to Marshall instead of Slater by the contention that it did not result in any more delay than the law permitted. The argument is based on the law that the holder of a check drawn on a bank at a distant place may place it in a bank for collection and that such bank, if it has no correspondent in the place where the check is payable, may on the day of receiving it or on the next day, transmit it to a correspondent at some other place, who in turn can wait until the next day after receiving to transmit to a correspondent at some other place, if it have none at the place where the check is payable, and so on, until it reaches a bank which has a correspondent at the place of payment; provided the route of transmission is not unreasonably circuitous.

It is contended that under this law the German Bank at St. Joseph which received and mailed the check to the Metropolitan on the thirteenth of December could have waited until the fourteenth to forward it to the Metropolitan at Kansas City. That the latter would then have received the check on the fifteenth and could have waited until the next secular day, which was Monday, the seventeenth, to forward to Slater,

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and that the correspondent at Slater could have waited until the next day, the eighteenth, to demand payment which would have been two secular days after the bank closed its doors, too late for payment, and consequently plaintiffs were not harmed. That line of argument is tantamount to this proposition: That if there should be three banks connected with the transmission, the first and second transmitting the day of receipt and not waiting until the next day, as they might have legally done, the third could wait three days after receipt for presentation, since that would be no more time than would have elapsed had each of the other banks taken the full limit of time to act. We think that that is not a correct view. In such case it is not what might have been, but what was. In this case, conceding that the German American Bank at St. Joseph might have retained the check until the day after its receipt before sending to the Metropolitan, it did not do so, and the latter's diligence must be judged by its own action, after receipt of the check, without regard to the action of the German American at St. Joseph. Bank v. Bank (Civil App. Texas January 29, 1896), 34 S. W. Rep. 458. It received the check on the fourteenth and mailed it the same day to its correspondent at Marshall instead of sending direct to Slater as it had customarily done. If it had sent to Slater it would have been received there several hours before the payer bank quit business. It elected to transmit the check the day of its receipt but negligently sent it to an improper place. Having committed this act of negligence it will not be permitted to speculate on the possibility of its not being presented if it had been sent to the proper place. Bank v. Bank, 71 Mo. App. 458; Bank v. Bank (Civil App. Texas, January 29, 1896), *supra*. In order to exonerate the Metropolitan it should appear that if it had sent the check to Slater, instead of sending it to Marshall, it still would not have been presented in time for payment and been paid before the closing at five o'clock on the evening of the fifteenth of December. Whether a

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collecting agent for the Metropolitan, as a person of ordinary prudence, would have presented it after its receipt on the fifteenth before the bank closed or waited until the following Monday is a question of fact to be determined by testimony and circumstances.

In this connection it may be of service at another trial to state that while generally an agent receiving a check on a local bank for collection may delay presenting it until the next day, yet if he knew the bank upon which it was drawn was in failing condition and likely to close business at any time, it would be his duty to proceed at once to present the check for payment, and not wait the time the law would ordinarily allow for presentation.

We have been cited to Bank v. Bank, 80 Md. 481, as giving a general support to defendant's contention. That case properly states the general law that though a bank may be guilty of negligence or lack of diligence in sending a draft for presentment and collection, yet if no injury results to the other party no liability is incurred. As if proper diligence had been used the check still would not have been paid. In stating that lack of diligence alone is not sufficient to fasten a liability, but that it must be the cause of an injury that court only stated what has been declared to be the law in this state. Morrison v. McCartney, 30 Mo. 183. But whether the Maryland court made proper application of the law declared to the facts of that case we need not inquire.

The case can be relieved of some of the questions with which, as we judge by the briefs, it was burdened at the trial.

The drawer of a check is not in many respects governed by the law applicable to the endorser of a negotiable promissory note. To discharge the drawer of a check there must be an actual injury result from the neglect of the payee or his agent. Morrison v. McCartney, 30 Mo. 183; Selby v. McCullough, 26 Mo. App. 66. So, it being shown that these

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plaintiffs customarily sent checks to defendant and that it placed them in bank at St. Joseph which transmitted to bank at Kansas City which transmitted to correspondent at place of payment, defendant had a right to so treat the check in controversy. Taylor v. Sip., 30 N. J. L. 284.

In this case it is admitted that the drawee bank is under assignment and hopelessly insolvent, and the case shows the check is worthless. In such state of case it is not necessary that the check should be returned to the drawers. Nor does its not being returned indicate an intention on the part of defendant to appropriate it as payment in fact of the debt.

The judgment will be reversed and the cause remanded. All concur.

JOHN H. WILSON, Adm'r, Appellant, v. HARRY E. RUTHRAUFF, Respondent. 82 435 / 87 227 / 82 435 / 95 335

Kansas City Court of Appeals, January 8, 1900.

1. **Administration:** EMBEZZLING ASSETS: DEBT OF ADMINISTRATOR. While under the statute relating to the embezzlement of assets an administrator may be compelled to inventory an account for property wrongfully withheld by him, yet he can not by a proceeding under such statute be compelled to litigate the question whether he had discharged a debt to his intestate or he himself is the owner of certain specific property which he in good faith claims as his own.

2. ———: FINAL SETTLEMENT: OBJECTION: CREDITOR. Section 275, Revised Statutes 1889, does not authorize a distributee to object to a final settlement because the administrator has failed to inventory an account for a debt alleged to be due the estate from himself. Said section relates only to creditors.

3. ———: ———: ADMINISTRATOR'S DEBT: JURISDICTION. A distributee can not by objecting to a final settlement raise and litigate the question whether the administrator is indebted to the estate since the latter is entitled to a jury trial on that issue, and the probate court has no jurisdiction to try such rights of property.

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4. ———: INVENTORY: ADMINISTRATOR'S DEBT: REMEDY. An administrator can not escape his liability for failing to inventory his debt to the estate because he honestly believes there is no such debt, but will be liable on his bond or in other appropriate action.

5. ———: FINAL SETTLEMENT: ADMINISTRATOR'S DEBT: JUDGMENT. An administrator's debt to the estate is merely an asset like any other debt and a judgment on final settlement compelling the administrator to pay such debt so as to make his sureties liable, is erroneous.

Appeal from the Johnson Circuit Court.—*Hon. W. W. Wood*, Judge.

REVERSED.

S. T. White and *J. W. Suddath* for appellant.

(1) If Wilson owes for five month's rent he owes it to objector, whose tenant he became upon the death of H. J. Ruthrauff. She, as his landlord, as owner of the rent, has right of action against him for it, as her tenant, and the estate of Ruthrauff does not own it and could not sue for it. In re Est. of Stuart, 67 Mo. App. 61; Shouse v. Krusor, 24 Mo. App. 279, and cases cited. The law determines the jurisdiction, not the parties. Stone v. Corbett, 20 Mo. 350; Tourville v. Railway, 61 Mo. App. 527; Abernathy v. Moore, 83 Mo. 65; McManus v. McDowell, 11 Mo. App. 436; Woerner's Law of Adm., secs. 151 and 317. (2) If the appellant could be charged with the rent in question, as administrator, it would not be treated as so much money on hand, but as an account to be collected against any other person, and if he disputed his liability he would be entitled to test his liability by common law trial by jury, the same as any other person would. Ridgway v. Kerfoot, 22 Mo. App. 661; McCarty, Adm'r, v. Frazer, 62 Mo. 263; Young v. Thrasher, 48 Mo. App. 331; McManus v. McDowell, 11 Mo. App. 436, 444. (3) If the appellant could be chargeable with the rent in question, as administrator, he could

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only be so chargeable in a proceeding to discover assets, or a proceeding to establish *devastavit*. R. S. 1889, secs. 78, 74 and 75; R. S. 1889, secs. 275, 276, 277 and 278; Ridgway v. Kerfoot, 22 Mo. App. 661, 665. (4) In either a proceeding to discover assets or to establish a *devastavit*, appellant would be entitled to a common law trial by a jury. R. S. 1889, secs. 74, 75, 76, 77 and 78; R. S. 1889, secs. 275, 276, 277 and 278; Ridgway v. Kerfoot, 22 Mo. App. 661, 665. Whereas, the final settlement was tried, and required to be tried, by a chancellor without intervention by jury. In re Estate of Schooler v. Stark, 73 Mo. App. 301; In re Estate of Meeker, 45 Mo. App. 194; Finley v. Schlueter, 54 Mo. App. 455. (5) Where a proceeding to discover assets is had against an executor, he must be examined under oath, and no other witnesses can be called except on his motion, and if the finding is for him on his testimony, he must be discharged. In re Estate of Stuart, 67 Mo. App. 61. (6) In a proceeding to discover assets the appellant, administrator, would be a competent witness. Stewart v. Glenn, Adm'r, 58 Mo. 481, 487, 488; In re Estate of Stuart, 67 Mo. App. 61.

S. J. Caudle, Nick M. Bradley and *Chas. E. Morrow* for respondent.

(1) This is not a proceeding to discover assets in the hands of the administrator, under the statute, nor is it a proceeding to compel him to inventory property belonging to the estate, or establish *devastavit*, under the statute, nor did he owe the deceased the debt at his death. He is simply made to account in his settlements for rent of property belonging to his intestate at the time of his death over which he assumed control as administrator and under color of his office as such—a liability which accrued against him after his appointment, and during his administration and which

arose out of the administration of his trust. The probate court has jurisdiction. Constitution of Missouri, sec. 34, art 6; R. S. 1889, sec. 3397; Ridgway v. Kerfoot, 22 Mo. App. 661, 667; French v. Stratton, 79 Mo. 560; Ensworth v. Curd, 68 Mo. 282; Johnson v. Johnson, 72 Mo. App. 386. (2) Although an administrator takes possession of real estate without an order of probate court, he is liable to account for the rent. Lewis v. Carson, 93 Mo. 587; Gamble v. Gibson, 59 Mo. 592; Dix v. Morris, 66 Mo. 514; State to use v. Scholl, 47 Mo. 84. The trial court found that Wilson had possession of the property as administrator and under color of his office as such. (3) Wilson was not a competent witness as to any matter or transaction had with Ruthrauff in his life-time which was in issue and on trial. R. S. 1889, sec. 8918. (4) The appellant was not entitled to trial by jury. In re Estate of Schooler v. Stark, 73 Mo. App. 301; In re Estate of Meeker, 45 Mo. App. 194; Finley v. Schlueter, 54 Mo. App. 455. (5) The listing of the real estate to the assessor as administrator; insuring the same in his name as the administrator, and repairing the property as administrator, and taking credit therefor in his settlement, all of which was done during the time he now contends he was not occupying the same as administrator, is the strongest evidence. His conduct can not be reconciled with any other theory. The law did not require him to do any of the acts above mentioned. (6) This is not a personal matter between Mrs. Ruthrauff and Wilson. He accounted for a portion of the rents of this property in his settlements and the fact is, as shown by the evidence in this case, he was in possession of this property under color of his office as administrator. In the face of these facts a personal action would have failed; he would have pleaded the final settlement as *res adjudicata*.

ELLISON, J.—Plaintiff is the administrator of the estate of H. J. Ruthrauff, deceased, and defendant is the

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sole distributee of such estate; and being thus interested made objection to plaintiff's final settlement in the probate court. There were several objections, but as the circuit court on appeal decided all but one against the objector, we will confine ourselves to that one, since the objector did not appeal and the administrator did.

The objection is, that the administrator had rented of deceased, in his life-time, a store building, and that he had failed to account for five months' rent accruing after the deceased's death and amounting to $175. The trial court found for the objector and rendered judgment charging the administrator with said $175, and that he, as such administrator, account for the same to the objecting distributee. And that he, as administrator, pay said sum to the distributee with interest. And that upon the payment of such sum, and the presentation of her receipt for the same to the probate court the administrator would be discharged on the settlement.

1. The first question presented is as to the remedy invoked by the objector. Where an administrator "has concealed, or embezzled, or is otherwise wrongfully withholding any goods, chattels, money, books, papers or evidences of debt of the deceased," he may, under the summary proceeding authorized by sections 74-78, Revised Statutes 1889, be compelled to inventory such property. It will be observed that the statute—section 77—provides that the person so offending may be compelled to deliver the property. But applying the law to the administrator himself, as authorized by section 78 (In re Est. of Stuart, 67 Mo. App. 61), we consider that its proper meaning is, that he shall be compelled to inventory and account for the property he has so wrongfully concealed, embezzled or withheld.

But this statute is not designed for the final adjudication of the title to property. And if it appear that the claim thereto is in good faith, and not a mere sham or afterthought,

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the parties should be left to other more appropriate and formal remedies for a settlement of the dispute. Johnson v. Johnson (decided this term); see also, Hook v. Dyer, 47 Mo. 214, 219. So, therefore, where an administrator fails to inventory a debt due from him to the estate, not from any wrongful motive, but in the *bona fide* belief that no such debt exists: As that if he had owed the intestate, he had discharged the debt to him in his life-time. Or, if specific property be the subject of the objection to his conduct, that he himself was the owner and not the estate, and other like instances, it was not contemplated by this statute that such question should be determined in such summary manner.

2. Nor does section 275, Revised Statutes 1889, apply to a case of objection to the administrator's conduct when made by a distributee, as in the case at bar. That section authorizes creditors to object to the final settlement of an administrator, if he has not made just account of the assets in his hands. A debt owing by him to the estate is as asset: Ridgway v. Kerfoot, 22 Mo. App. 661; but his misconduct under this section can only be corrected at the instance of a creditor.

3. These statutes have been suggested by the administrator, but the objector claims that she is not proceeding by either of the modes, and that she need not do so in order to sustain her point of objection. She claims the right to adjudicate the title to property claimed to be an asset, and the question of an administrator's indebtedness to the intestate, at the final settlement. We are of the opinion that her claim is not supported by the law. This becomes apparent by reference to the nature of the controversy. The administrator failed to inventory against himself the account for rent, for two reasons: First, that the account did not exist, since he paid the rent to the deceased in his life-time, in advance; that the payment was the result of a settlement between them. Second, that conceding he owed rent for the

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time charged (which was after the death of the intestate) he owed it to the heir as such and that the estate was not concerned with it. His first contention is of the utmost importance to him. He is entitled to a jury trial in the ordinary mode as to whether he is indebted to the estate. Such controversy might involve large sums and work ruin to a protesting administrator. Are his rights to be determined in a summary manner by the probate court, on a final settlement where he would not have a jury trial? The probate court, on a final settlement, is not the place to adjudicate such rights of property claimed in good faith, in the absence of a statute to that effect. If the statute so directed, it may be that the administrator, by accepting the trust under such statute, would be held to have voluntarily surrendered his right to a jury trial; *volenti non fit injuria.* Wood v. Tallman, 1 N. J. L. 153; Everts v. Everts, 62 Barb. 577. But our statute does not so direct, either expressly or impliedly. The nearest statute to this subject is that contained in sections 74-78, and these, besides not being invoked here, do not, as we have already shown, authorize an adjudication of the title to property, as was attempted in this case.

4. The objector is by no means without remedy. An administrator can not escape a debt to the estate merely for the reason that he may honestly believe there is no such debt. It is his duty, under the statute, to inventory it, and if he fails to do so, however conscientious he may be, he and his sureties will be liable on his bond. Sherwood v. Hill, 25 Mo. 391; Brotherton v. Spence, 52 Mo. App. 664, 668. In such an action, all the proper legal machinery would be at hand to test the rights of the parties and finally determine their claims. It is proper enough for one believing an administrator has omitted to inventory a debt against himself to demand that he do so, but it does not follow that relief for a failure to comply is to be immediately found in a contest on the settlement.

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We do not mean to say that the only remedy is by an action on the bond. There may be other ways of attacking the settlement in the proper court. But that is not necessary to discuss.

5. Even if we had found the objector had invoked the proper remedy, we would nevertheless have had to reverse and remand the cause on account of an improper judgment. It will be observed that the effect of the judgment is not only to charge the administrator with the debt to the estate as though inventoried, but it compels him as administrator to pay it. His administration sureties are made liable. This was error. The debt owing by an administrator to the estate is an asset in his hands. But it is not necessarily a collectable asset. It is not to be treated as cash. The debtor administrator may be insolvent. It is only such an asset as it would be if owing by any one else, and is to be administered as such. Ridgway v. Kerfoot, 22 Mo. App. 661; Young v. Thrasher, 48 Mo. App. 327.

The result of these views lead to a reversal of the judgment, and it is so ordered. All concur.

IN RE MYRTLE KOHL.

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97	128

Kansas City Court of Appeals, January 8, 1900.

Habeas Corpus: JURISDICTION: DIVORCE PROCEEDING: CUSTODY OF CHILD. A court granting a divorce has a continuing jurisdiction over the custody of the children of the parties subject to be invoked at any time and other courts will not interfere by writ of habeas corpus.

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Original Habeas Corpus.

WRIT DENIED.

Blake L. Woodson and *F. E. J. Warrick* for appellant.

(1) The court had jurisdiction in *habeas corpus*. Constitution of the state of Missouri, sec. 12, art. 6; Act of March, 1883, sec. 4; Session Laws 1885, p. 215; R. S. 1889, chap. 78, sec. 5346. In court of record. In re McDonald, 19 Mo. App. 390; R. S. 1889, chap. 78, sec. 5415, as to the custody of children. (2) The action of any former court does not and can not be reviewed by this court. In re Laura Doyle, 16 Mo. App. 159. (3) A father can not irrevocably divest himself of his right and duty to have the custody and charge of his child. In re Scarritt, 76 Mo. 565. (5) A party refused a discharge on one *habeas corpus*, may pursue his remedy by this writ on subsequent applications until perhaps he has exhausted the entire judiciary powers of the state. Howe v. State, 9 Mo. 690; In re Gladys Morgan, 117 Mo. 249. (5) Even if new facts and circumstances are shown, a second application may be granted. People v. Memeim, 3 Hill (N. Y.), 399; Weir v. Marley, 99 Mo. 494. (6) The father is the proper guardian of his child, and as such is entitled to the custody of its person unless he is shown to be for some reason unfit or incompetent to take charge of the child. In re Scarritt, 76 Mo. 565; Weir v. Marley, 99 Mo. 484.

Ralph S. Latshaw for respondent.

(1) The judgment of the circuit court of Linn county, in so far as the same touches the care, custody and maintenance of the child, Myrtle Kohl, is subject to review only in said court, and said circuit court has exclusive jurisdiction to adjudge the guardianship of the child; and if the welfare

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of the child requires the immediate intervention of a court on its behalf, resort ought to be had in the first instance to said circuit court. R. S. 1889, sec. 4511; In re Delano, 37 Mo. App. 185; Williams v. Williams, 13 Ind. 523; In re Laura Doyle, 16 Mo. App. 159; In re Gladys Morgan, 117 Mo. 249. (2) By virtue of the decree of the circuit court of Linn county, Missouri, the child, Myrtle Kohl, became the ward of said court, and said court having acquired jurisdiction over the parties and subject-matter involved in this proceeding, other courts will not interfere by the writ of *habeas corpus*, but the parties will be remitted to the court in which the divorce is pending for directions as to the custody of the child. Church on Habeas Corpus, sec. 265; 2 Bishop on Mar., Div. & Sep., sec. 1184; In re Gladys Morgan, 117 Mo. 249; In re Delano, 37 Mo. App. 185.

GILL, J.—The subject-matter of this controversy is the custody of a little girl less than four years of age and who is the only child resulting from the marriage of Peter and Kate Kohl. In February, 1899, the latter procured in the circuit court of Linn county, Missouri, a decree of divorce from said Peter Kohl, and the court at the time awarded the care, custody and control of the infant to said Kate Kohl. When this writ was sued out by Peter Kohl, the child was in the immediate possession of Mr. and Mrs. Rauer, of Linn county, who are the parents of Mrs. Kate Kohl. These old people claim to have charge of the little girl for and on account of their daughter, and the child's mother, who, it seems, was at the time working elsewhere as a domestic. The whole controversy is, whether the child shall remain under the practical custody and control of its mother, Kate Kohl, or whether it should be taken from her and given to the petitioner, Peter Kohl, who now lives with his parents at Armourdale, Kansas.

At the threshold of the proceeding, Kate Kohl, the real

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respondent, enters an objection in the nature of a plea to the jurisdiction of this court. It is in effect claimed, that since in the divorce proceeding heretofore prosecuted to judgment in Linn county, she, the respondent, was awarded the care and custody of the child and that as said decree has never been in any way modified, the petitioner should be required to apply to that court and can not be heard to complain here.

After a careful consideration of the question we conclude the respondent mother to be right in this contentiou. In so far as the custody of little Myrtle is concerned, the decree of the Linn circuit court is subject, on a proper application and showing, to be changed and modified. As that judgment now stands, the mother, Kate Kohl, is entitled to the care and custody of the infant. If there has been such a change in the circumstances or character of the parties that said custody should be changed from mother to father, the latter should there apply for a modification of said judgment. On consideration of the statute and the authorities we find this to be the proper course. Our divorce statute (section 4505, Revised Statutes 1889), provides that, "when a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case shall be reasonable." And further, under section 4511, while review of the judgment for divorce is, in general terms, prohibited, it is yet provided that, "there may be a review of any order or judgment touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as in other cases." It will be seen therefore that jurisdiction remains with the Linn circuit court—even after final judgment—to change or modify, for cause shown, its order relating to the custody of the infant child. That court may, on the application

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of either party, hear such a complaint as this and then, if deemed advisable, proceed to modify or change the original order relating to the custody of the child. In so far as concerns that matter, there remains in the Linn court a continuing jurisdiction over the parties and subject-matter. And this being so, the authorities agree that it would not be proper for this court to interfere, but rather remand the parties to the Linn circuit court. In re Gladys Morgan, 117 Mo. 249; In re Delano, 37 Mo. App. 185; Williams v. Williams, 13 Ind. 523; Hoffman v. Hoffman, 15 Ohio St. 427; Sherwood v. Sherwood, 56 Iowa, 608; Dubois v. Johnson, 96 Ind. 6; 2 Bishop on Mar., Div. & Sep., secs. 1184, 1187, 869; Church on Habeas Corpus, sec. 265.

The case of Gladys Morgan, *supra*, though different in one respect—in that the divorce was still pending—is yet in point. That was a proceeding by *habeas corpus* in the supreme court to get possession of a child—the suit for divorce then pending in a circuit court. The supreme court refused to entertain the application, and intimates that the same rule would apply even where the application is made after final judgment of divorce. In the opinion it was said: "The general rule is that, where one court has acquired jurisdiction over the parties and subject-matter of the suit, other courts will not interfere by the writ of *habeas corpus* while the suit is pending and undetermined. If a court having jurisdiction of the parties in a divorce suit has the further power to award the custody of children to the party entitled thereto, the question as to such custody will not be adjudged on a writ of *habeas corpus* by another court, but the parties will be remitted to the court in which the divorce suit is pending," etc. The principle announced in the case just quoted from is applicable here. Though the divorce suit of Kohl v. Kohl was, in its main feature, finally disposed of by a judgment entered by the Linn circuit court, in February, 1899, yet in so far as concerns the custody of the infant

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Myrtle, the cause remains open for further orders or changes. The statute before quoted has kept the case alive for that purpose and the cause remains in court with full jurisdiction in the trial court, on proper application, to change and modify its judgment and order relating to the custody of the child. As was said in Hoffman v. Hoffman, *supra*, the courts "regard the jurisdiction conferred by the statutes on the courts granting divorces, in respect to the care and custody of the children of the parties, as being in its nature a continuing jurisdiction over the subject-matter, and subject to be invoked at any time on proper application, whenever the circumstances of the case may require it."

Holding then, as we do, that this court ought not to take jurisdiction or determine the rightful custody of this child the writ will be denied and the infant Myrtle Kohl will be remanded to the keeping of the respondent mother. The other judges concur.

JOHN P. HAX, Appellant, v. ACME CEMENT PLASTER COMPANY, Garnishee of S. A. WALKER, Defendant, Respondent. 82 447 / 183 475

Kansas City Court of Appeals, January 8, 1900.

1. **Garnishment;** PLEADING: PETITION: DENIAL. In garnishment the denial of the answer by the plaintiff stands in the place of the petition in an ordinary action and no issues are raised by the interrogatories and answer.

2. ——: ——: ADMISSION: ASSIGNMENT. Where a denial admits an assignment and assails its validity on the ground of fraud, the issue is whether the assignment was fraudulent, and the burden of proof is on the plaintiff; and if there is no evidence controverting the answer of the garnishee, it is conclusive; and in this case an assignment is held valid and free from fraud.

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3. **Wages:** ASSIGNMENT OF: PUBLIC POLICY. An assignment of wages to be earned under an existing contract of employment made in good faith and for valuable consideration is valid, and it is immaterial that the assignor works from day to day and for no specified time.

4. ———: ———: EQUITY: EXPECTANCY. In equity an assignment of wages that are a mere expectancy or possibility is valid as an agreement to assign; and when such wages are earned and in fact paid to the assignee, the transaction is valid and binding.

5. ———: ———: ACCEPTANCE: CONTINUANCE: GARNISHMENT. An assignment "of all claims and demands which I now have and which I may have at any time between the date hereof and July, 1899," which is accepted by the employer of the assignor without reference to any particular contract, attaches to all the earnings of the assignor during his continuous service for the employer; and the assignor's creditors stand in his shoes and have no greater rights to the assigned wages than he, and the service of garnishment on the employer did not suspend the assignee's right to the assigned wages.

Appeal from the Buchanan Circuit Court.—*Hon. W. K. James*, Judge.

AFFIRMED.

James W. Boyd for appellant.

(1) An assignment of wages before the assignor has entered into any contract under wihch he hopes to earn them, is too vague and uncertain to be sustained; is against public policy, and is void as against attaching creditors. Eagan v. Luby, 133 Mass. 543; Herbert v. Bronson, 125 Mass. 475; Mullhall v. Quin, 1 Gray 105; Hartley v. Tapley, 2 Gray 565; Edward v. Peterson, 80 Me. 367; Rood on Garnishment, sec. 73; Railroad Co. v. Woodring, 116 Pa. St. 513; Jones on Chattel Mortgages, sec. 144; Neuman v. Calumet Co., 57 Mich. 97. The court committed error in permitting the respondent to introduce its evidence before the appellants

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closed their case. (2) Under the pleadings in the case appellants are entitled to judgment against the respondent, because in the respondent's answer it admits that on or about the twenty-second day of November, 1897, there did become due from it to S. A. Walker the sum of $912.50. It is no defense in this case to say that the garnishee paid said sum under an assignment to Martha Walker, because it is admitted in the answer that it became due to S. A. Walker on November 22, 1897.

Johnson, Rusk & Stringfellow, Ben. J. Woodson, Frank Hagerman and *Willard P. Hall* for respondent.

(1) The assignment by Walker to his mother of compensation to be earned by him in the future, whether the contract of employment was then in existence or not, was good in equity and therefore binding alike upon Walker and his creditors. 2 Ency. of Law [2 Ed.], 1032; Page v. Gardner, 20 Mo. 511; Thompson v. Foerstel, 10 Mo. App. 299-300; Schubert v. Herzberg, 65 Mo. App. 585; Mitchell v. Winslow, 2 Story, 630; Field v. City of New York, 6 N. Y. 179. (2) The assignment here was valid for the additional reason that there was at the time a subsisting contract between Walker and the cement company. Dolan v. Hughes, 40 Atl. Rep. (R. I.), 344; Wellborn v. Buck, 21 So. Rep. (Ala.) 786; Metcalf v. Kincaid, 54 N. W. Rep. (Ia.), 867; 2 Ency. of Law [2 Ed.], 1031; 4 Century Digest, p. 1149, par. 20. (3) The assignment was valid at law as well as in equity for the reason that immediately upon its execution it was presented to and accepted by the cement company. Wellborn v. Buck, 21 So. Rep. 786; Metcalf v. Keene, 54 N. W. Rep. 867. (4) No rights of third parties have intervened in this case. Schubert v. Herzberg, 65 Mo. App. 586.

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SMITH, P. J.—The Acme Cement Plaster Company—a corporation—was garnished on an execution which was issued on a judgment in favor of Hax and other creditors against S. A. Walker.

The garnishee, in answer to the fifth interrogatory exhibited against him by the creditors, stated that, "the defendant, S. A. Walker, at the time of the service of the garnishment was and now is in the employment of the garnishee, receiving as compensation for his services a salary of four thousand dollars ($4,000) per annum, payable monthly in advance, and in addition thereto five (5) per cent of the net earnings of the garnishee. The defendant is a resident of St. Joseph, and is a married man and the head of a family. The garnishee has paid the fixed compensation payable monthly as aforesaid as it became due and payable to the said S. A. Walker, and there is nothing now due or owing to him on account thereof.

"The defendant at or about the time of his employment by the garnishee and long before the service of garnishment in this case assigned that portion of his compensation covered by the five (5) per cent of the net profits of the garnishee for value and in writing to Martha Walker, who presented the said assignment to the garnishee and demanded payment of the said portion of the compensation included therein, and the garnishee has since then paid that portion of said defendant's compensation as it accrued and became due and payable to the said assignee, Martha Walker. This garnishee did not owe the said defendant anything on account of the compensation covered by said assignment at the time of the service of the garnishment, but afterwards on or about the twenty-second day of November, 1897, there became due to him on account thereof the sum of nine hundred and twelve dollars and fifty cents ($912.50), which sum on said day the garnishee paid by virtue of said assignment to the said Martha Walker,

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and there is nothing now owing by the garnishee to the said defendant on any account whatever."

The creditors, in their denial, controverted generally the answer of the garnishee, and then specially alleged the pretended assignment of the five per cent earnings of the garnishee was made, if made at all, with the design and purpose, on the part of the defendant and Martha Walker, the assignee, of hindering, delaying and defrauding the creditors in the collection of their indebtedness against defendant, and of which fraudulent intent and purpose the garnishee had knowledge; and to that extent it colluded with defendant, and said assignee, to defraud the creditors of the defendant. The reply was a general denial.

Under our practice, the denial of the answer by the creditors stands in the place of the petition in an ordinary action at law. Bank v. Dillon, 75 Mo. 380; Bunker v. Hibler, 49 Mo. App. 536. The issue is not raised by the interrogatories and answer of the garnishee, but by the denial of the answer and reply thereto. The interrogatories and answer are merely preliminary to the framing of the issue.

The denial in this case, in effect, admits the assignment but assails its validity on the ground of fraud and collusion. Bauer v. Wagner, 39 Mo. 385; Nelson v. Brodhack, 44 Mo. 596. The issue thus made was whether or not the assignment was fraudulent as to the creditors. The burden of proof was on the creditors. If no evidence was introduced to overthrow the answer of the garnishee, it was conclusive in his favor. Bunker v. Hibler, *supra*; Waples on Attach. & Gar. 376.

But whether the assignment was admitted or not by the denial seems of no moment now, since it was introduced in evidence at the trial. The undisputed evidence disclosed that the defendant, at the time of the service of the garnishment, was, under a previously made contract with the garnishee, receiving a salary of four thousand dollars per annum for his services, payable monthly in advance, together with five

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per cent commission of the net profits of the business of the garnishee, for the then current year which ended in November. It was further disclosed by the evidence that at the end of the year there was due the defendant, on account of said commission, the sum of $912.50.

The assignment already referred to recited that in consideration of the indebtedness of the defendant to the said Martha Walker—evidenced by a note in the sum of $40,000, dated March 1, 1890, due ten years after date, payable to H. T. Walker and by him assigned to the said Martha Walker and executed by the defendant and J. W. Walker—the defendant assigned to the said Martha Walker all claims and demands that he then had, or might at any time have between the date thereof—July 20, 1896—and the first day of July, 1899, against the garnishee for money due, and for all sums of money and demands which at any time between the date thereof and July 1, 1899, might become due him for services as manager of the garnishee company, except the sum of $4,000 which the garnishee company had agreed to pay defendant as a fixed and certain salary. It further recited that, the said Martha Walker was appointed as the attorney in fact of the defendant to collect said five per cent commission from the garnishee, receipt therefor, etc. There was an acceptance of the assignment by the garnishee indorsed thereon, dated July 20, 1896, and signed by W. A. P. McDonald, president. It further appears that the said sum of $912.50, the amount of the five per cent commissions, to which the defendant was entitled in November, 1897, under said agreement with the garnishee, was paid by said garnishee to the said Martha Walker.

There was no evidence adduced tending in the least to impeach the *bona fides* of the indebtedness which constituted the consideration for the assignment. The integrity of the transaction between the defendant and the said Martha Walker and that between the defendant and garnishee was

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impugned by no evidence that we have been able to find in the record. The answer of the garnishee was evidence in his favor, even in regard to all the affirmative facts stated therein by way of avoidance. Holton v. Railway, 50 Mo. 151; Walker v. Fairbanks, 55 Mo. App. 478. Hence it was incumbent on the creditors to prove that the assignment was fraudulent, in order to avoid its force and effect. It is undisputed that the assignment was made to secure a *bona fide* debt due by the defendant to Mrs. Walker. The assignment is little more than an order of the defendant on the garnishee to pay to Mrs. Walker whatever amount of five per cent commissions that might annually become due the defendant, in part payment for his services as general manager. This order was accepted by the garnishee and there is nothing shown in respect thereto that in any way impairs its efficacy. The payment, so far as disclosed by the evidence, was in no wise fraudulent. The whole transaction was a *bona fide* preference, of which, under our law, no one has a right to complain.

Indeed, it would seem from the brief of the creditors that they do not so much rely upon fraud to avoid the assignment as they do upon the ground that it is vague, uncertain and in contravention of public policy. Whether or not the last of the two grounds upon which the validity of the assignment is questioned is covered by the issues made by the pleadings we need not stop to consider, since both parties, in their briefs, seem to have so regarded it.

On January 1, 1895, the defendant entered into the contract of employment with garnishee hereinbefore referred to, which was extended or renewed on the first day of January, 1895 and again in 1896. The contract therefore under which the wages in question were earned is a renewal or extension of that in existence when the assignment was made. The defendant's employment was continued under what was in effect the same contract that was in existence when the assignment was made. It has been held in Connecticut, Iowa,

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Maine, Maryland, Massachusetts, Michigan, New Hampshire, Vermont and Wisconsin, that an assignment of wages or salary to be earned under an existing contract of employment made in good faith and for a valuable consideration, is valid. 2 Am. and Eng. Ency. of Law, 1031, note 2. And in such case it is immaterial that the assignor works from day to day, and is hired for no specified time; Taylor v. Lynch, 5 Gray (Mass.) 49; or that he works by the piece and his wages per month vary; Hartley v. Tapley, 2 Gray (Mass.) 565; or that he is removable at any time; Brackett v. Blake, 7 Met. (Mass.) 335. These cases, as said in Emerson v. Railway, 67 Maine, 392, were decided upon legal and not equitable rules.

It has been held that the mere expectation of earning money can not, in the absence of any contract on which to found such expectation, be assigned. 2 Am. and Eng. Ency. of Law, 1032, note 5, and cases there cited. It is common learning in the law that a man can not grant or charge that which he hath not. Looker v. Peckwell, 9 Vroom. 253. But the reason that it may be different in equity is not that a man conveys *in presenti* what does not exist, but that which is in form a conveyance operates in equity by way of present contract merely, to take effect and attach to the things assigned as soon as they come into *esse*, to be regarded before that time as only an agreement to convey, and after that time as a conveyance. Mitchell v. Winslow, 2 Story, 630. And this is now the well-settled doctrine of this state. Page v. Gardner, 20 Mo. 511; Wright v. Bircher, 72 Mo. 187; Rutherford v. Stewart, 79 Mo. 216; Johnson Co. v. Bryson, 27 Mo. App. 349; Schubert v. Herzberg, 65 Mo. App. 585. In Field v. Mayer, etc., 2 Seld. 179, it was held that the assignment of a claim against the city for work to be done and materials to be furnished, not founded upon an existing contract and having no potential existence, was valid in equity. In the course of the opinion in the case it is said that, courts of equity will support assignments not only of choses in action, but of con-

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tingent interests and expectations, and things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. In Williamson v. Colcord, 1 Hask. 320, it was held that, the mere expectancy and possibility of indemnity for the destruction of a vessel by a Rebel cruiser was subject to donation, even before the Geneva commission was agreed to by England and the United States. In Edwards v. Peterson, 80 Maine, 367, it was held that, an assignment of wages expected to be earned in the future in a specified employment, though not under an existing contract of employment, is valid in equity. And so it has been held that courts of equity will support assignments not only of choses in action but contingent interests and expectations, and also things which have no present actual or pretended existence, but rest in mere possibility only. Bacon v. Bonham, 6 Stew. 616; Smithurst v. Edmunds, 1 McCart. 416; Langton v. Horton, 1 Hare, 549; Robinson v. McDonnell, 5 M. & S. 228; Apperson v. Moore, 30 Ark. 56; Edwards v. Peterson, *ante*.

The invalidity of a grant or assignment at law of a mere expectancy imparts no more than that it is ineffectual to pass the legal title. Equity construes the instrument as imposing a lien upon the *res* where produced or acquired, leaving the legal title still in the grantor or assignor, who may by some act ratify the grant or assignment, as by delivery of the property, and then the legal title is complete in the grantee or assignee. Thompson v. Foerstel, 10 Mo. App. 290; Everman v. Robb, 22 Miss. 653.

But under the assignment in issue, the legal right and title to the wages due the defendant by the garnishee passed to the assignee, as against the creditors herein. In Wallace v. Walter, etc., 16 Gray, 209, it was held that, a written order for the payment of a certain sum out of the wages drawn, for a sufficient consideration, by a workman employed under

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such subsisting agreement for a certain time, upon his employer, and by the latter accepted, payable when earned, applied to wages earned under a new engagement entered into by the workmen immediately upon the expiration of the first for lower wages with the same employer, and could not be defeated by a subsequent assignment to another person of the wages to be earned under the new engagement. See Taylor v. Lynch, 5 Gray. 49; Lannan v. Smith, 7 Gray. 150. Boylen v. Leonard, 2 Allen, 407, was where the assignor assigned "all the demands which I now have or which I may hereafter have against Hall & Co. for services done or to be done," etc. The assignment was executed January 19, 1860. The assignor was then employed under an agreement whereby he was to be paid wages at the rate of $18 per month. This agreement continued from May 1, 1859, until July 1, 1860, at which latter date the agreement was entended, the future wages being fixed at $20 per month thereafter. It was held that the indebtedness for the service rendered after the extension of the agreement, and the change of the monthly wages, was covered by the assignment. In the case now before us, the contract of employment existing at the time of the assignment was twice extended without any change as to the rate of monthly wages. It was continued from year to year. The assignment here was of "all claims and demands which I now have and which I may have at any time between the date hereof and the first day of July, 1899," etc. This assignment, as has already been stated, was in effect an order on the garnishee for the amount of any wages earned by the defendant between the date of the assignment and July 1, 1899. This order having been accepted by the garnishee without reference to any particular contract, according to the ruling in the cases just referred to, attached to and was effective as to all the earnings of the defendant, the assignor, during his continuous service for the garnishee. There was no break in the continuity of the employment and the wages

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so earned were covered by the assignment. The creditors here stand in the defendant's shoes. Reinhart v. Empire Soap Co., 33 Mo. App. 24. They have no other or greater rights than he with respect to the wages in dispute. He could not lawfully transfer such wages to another without the consent of the garnishee after the acceptance of the assignment by it. If the defendant could not voluntarily do so, it follows that his creditors could not acquire any rights thereto by the process of garnishment.

The garnishee's right to apply the wages so due, in payment of the accepted claim of the assignee, was not suspended by the garnishment. Schubert v. Herzberg, *ubi supra*. As was said in Wellborn v. Buck, 21 Southern Reporter (Ala.), 786: "In this case there was a present interest on which the assignment could operate—an actual subsisting engagement for the rendition of services at a fixed compensation. The only uncertainty attending it was the duration of the time or period of service, and this uncertainty did not lessen its assignability. The consideration and fairness of the assignment was not impeached and the rights of the assignor was superior to that that could be asserted by any creditor."

Some complaint is made by the creditors on account of the action of the court in permitting the assignment and the acceptance thereof to be read in evidence in connection with that adduced by them, but in view of the fact that the case was tried before the court without a jury, it is not perceived that they were in any way seriously prejudiced by the irregularity.

The action of the court at the conclusion of the creditors' evidence in declaring, as a matter of law, that they were not entitled to recover, was, as we think, unexceptionable, and it therefore follows that the judgment must be affirmed. All concur.

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85	424
82	458
90	430
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82	458
95	*323
95	*336

THE STATE OF MISSOURI ex rel., F. J. TYGARD, Curator, etc., Plaintiff and Defendant in Error, v. JOHN M. ELLIOTT et al., Plaintiffs and Defendants in Error.

Kansas City Court of Appeals, January 8, 1900.

1. **Appellate and Trial Practice:** REFEREE'S REPORT: MOTION FOR A NEW TRIAL. To review the action of a trial court in passing on exceptions to the report of a referee, a motion for a new trial is necessary; and the appellate court will not review any action of the trial court which is not mentioned in such motion.

2. **Guardian and Curator:** ALLOWANCE FOR INTEREST ON BORROWED MONEY: ANNUAL SETTLEMENTS: IMPEACHING TESTIMONY. Where a ward's estate is subject to fixed charges and there are no funds in hand to pay the same when they become due and the curator borrows money to discharge them and receives credit for interest on such borrowed money in his annual settlements, such settlements are *prima facie* correct and will be so held in the absence of impeaching testimony.

3. ———: ———: WARD'S ESTATE IN TWO STATES. Where a ward has an estate in both Missouri and Kentucky and it is necessary to protect his estate that money be borrowed, the fact that the curator transfers the proceeds of the Missouri estate to meet the necessities of the Kentucky estate will not defeat his right to credit for interest on money borrowed to protect the former estate.

4. ———: ILLEGAL TAX: PENALTIES: CREDIT FOR. Where a curator pays an illegal tax and penalties accrued thereon and receives credit therefor in his settlement, in the absence of impeaching testimony he is entitled to such credit on final settlement, especially where the estate is shown to be without money in hand at all times to pay its fixed charges.

5. ———: ATTORNEY'S FEE: FAILURE TO DISCHARGE DUTY. Where a curator has discharged all his duties he is entitled to a reasonable attorney's fee in defending his settlements; but if he has not so discharged his duties, he is not entitled to such allowance.

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6. ———: TRANSFER OF FUNDS: COMMISSIONS. Though a transfer of funds of the ward from one state to another may not be in strict conformity with the law and under direction of the probate court, yet, where the money is actually applied to preserve the ward's estate and is reported to the probate court and allowed in the annual settlement, an allowance of five per cent commissions can not be held to be illegal.

7. ———: TRAVELLING EXPENSES OF APPOINTMENT: PAYMENT TO AGENT. A curator residing in another state is not entitled to a credit for his expenses in coming to this state to qualify, but a payment which is allowed in his first settlement for services of an agent is *prima facie* correct and will be allowed in the absence of impeaching testimony.

8. ———: PAYMENTS TO STEWARD. A nonresident curator may be entitled to the services of a steward in the management of a large farm belonging to his ward in this state, and the rule to determine the compensation of such steward is not necessarily fixed by the fact that others near the estate would have done the work for a less sum with less expense, especially where such steward has increased the productive capacity of the farm and secured handsome returns.

9. **Appellate and Trial Practice**: FINDING OF REFEREE: SPECIAL VERDICT: EVIDENCE. The finding of a referee is a special verdict and a reviewing court will not disturb the result if there be any substantial evidence to support it.

10. **Guardian and Curator**: UNPLEADED ITEM. In an action on a curator's bond he will not be allowed a credit which is not pleaded in his answer and is without any evidence to support it.

11. ———: ROAD TAX: PAYMENT TO WRONG OFFICER. The fact that a guardian paid a road tax to a wrong officer will not of itself defeat his right to a credit therefor.

12. ———: COMMISSION ON PAYMENT TO WIDOW. A guardian and curator is not entitled to commissions on an amount paid the widow of the ward's father for her part of the rent of land subject to her dower.

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13. **Trial Practice:** REFEREE'S REPORT: RULINGS OF EVIDENCE. The failure of a referee in his report to make rulings on the introduction of evidence will not warrant the setting aside of such report where such failure does not operate to the prejudice of the accepting party.

14. **Guardian and Curator:** ACTION ON BOND. On the record in this case it is held that relator's action was properly sustained and a modified judgment is entered.

Error to the Cass Circuit Court.—*Hon. W. W. Wood*, Judge.

JUDGMENT MODIFIED.

Thos. J. Smith for plaintiff.

(1) This action is maintainable without final settlement having been made. State ex rel. v. Roeper, 9 Mo. App. 21; State ex rel. v. Miller, 44 Mo. App. 122; Clarke v. Sinks, 144 Mo. 448. (2) The annual settlements of defendant, Elliott, with the probate court have not the effect of judgments; and all errors found therein may be corrected at the final settlement, or in an action on the bond where no final settlement has been made. Picot v. Biddle's Adm'r, 35 Mo. 29; In re Davis, 62 Mo. 453; In re Barnes, 43 Mo. App. 296; State ex rel. v. Miller, *supra*; McPike v. McPike, 111 Mo. 225; Clark v. Bettelheim, 144 Mo. 258-273. (3) The matters of defense pleaded by the defendants being affirmative, the burden of proof to establish the same was upon the defendants. (4) The degree of care, diligence and prudence required of Mr. Elliott as curator, in the discharge of all his duties as such, was that which a careful and prudent man exercises in the management of his own affairs. State ex rel. v. Meagher, 44 Mo. 361; Julian v. Abbott, 73 Mo. 580; Jacobs v. Jacobs, 99 Mo. 435; Powell v. Hurt, 108 Mo. 513; Scudder v. Ames, 142 Mo. 231-232; Spaulding v. Wakefield's Est., 53 Vt. 660. (5) This care required that he give his personal attention to the duties of his trust. 1 Perry on Trusts, sec. 266, 402;

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2 Perry on Trusts, sec. 603; McCloskey v. Gleason, 56 Vt. 264; s. c., 48 Am. Rep. 770. The same principle is recognized in our constitution, art 2, sec. 18. (6) Even if the evidence of Mr. Elliott as to the direction of Mrs. Hamilton to employ Mr. Ficklin as his agent had been competent, this would have been no justification of his doing so at an unnecessary increase of cost to his ward's estate. He was required, at his peril, to act in all matters judiciously. Folger v. Heidel, 60 Mo. 284; Scudder v. Ames, 89 Mo. 509; Spaulding v. Wakefield's Estate, 53 Vt. 660; s. c. 38 Am. Rep. 709. (7) The approval of the annual settlements in which money was accounted for by defendant, Elliott, as transferred to Kentucky was not a final judgment from which an appeal could have been taken. Baker v. Runkle, 41 Mo. 391; State ex rel. v. Miller, 44 Mo. App. 122; In re Barnes, 43 Mo. App. 295. (8) The order transferring or refusing to transfer said funds under the statute is a judgment from which an appeal will lie. R. S. 1889, sec. 5317; In re Wilson, 95 Mo. 184. (9) Even if the probate court had made its order approving these several transfers after they had been made, that would not have been equal to, or taken the place of, the proceedings required by statute to authorize the transfer. Lake v. Meier, 42 Mo. 389; Mueller v. Kaessmann, 84 Mo. 318. (10) Defendants are not entitled to any credit on account of the payment of the costs, commissions, penalties and interest that accrued upon the taxes allowed to become delinquent while in the charge of the defendant, Elliott, it being his duty to keep these paid promptly. Williams v. Petticrew, 62 Mo. 460; Jacobs v. Jacobs, 99 Mo. 437. (11) After the decision of the case of State ex rel. v. Railway, 123 Mo. 72, certainly there was neither justification nor excuse for the payment of the taxes for county purposes in excess of the constitutional levy. Scudder v. Ames, 89 Mo. 512. (12) The recovery must be confined to the issues made by the pleadings. 2 Thompson on Trials, 2309; Currier v. Lowe, 32

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Mo. 203; Waddingham v. Hulett, 92 Mo. 528; Wright v. Fonda, 44 Mo. App. 634; Aultman & Taylor Co. v. Smith, 52 Mo. App. 351. (13) The defendant is not entitled to credit for commission on the amount of money paid by himself to Mrs. Emma Hamilton as her absolute property, as against these wards. R. S. 1889, sec. 5334; Hawkins v. Cunningham, 67 Mo. 415-418; Jacobs v. Jacobs, 99 Mo. 437; In re Estate of Boothe, 38 Mo. App. 456; Scudder v. Ames, 89 Mo. 512; Tracy v. Railway, 13 Mo. App. 295; s. c., 84 Mo. 210; 27 Am. and Eng. Ency. of Law, pp. 190, 191. (14) It was the duty of defendant Elliott to keep an accurate account of all his transactions as curator, the penalty for failing in which, being, that compensation may be disallowed. 2 Perry on Trusts, sec. 911; State ex rel. v. Berning, 74 Mo. 87-100. (15) Refusal to make settlement to the probate court under the circumstances in this case being willfull would justify refusal of any compensation to the trustee. 27 Am. and Eng. Ency. of Law, p. 187, note 3.

Chas. W. Sloan and *R. T. Railey* for defendants.

(1) Settlements of administrators and curators are on the same footing in this state; and before plaintiff could set aside allowances and credits allowed by the probate court of Bates county it should have been charged in petition that they were fraudulently secured to be allowed, or the facts pleaded specifically, which was not done. State ex rel. v. Roland, 23 Mo. 95; Jones v. Brinker, 20 Mo. 87; Sheetz v. Kirtley, 62 Mo. 417; Cooper v. Duncan, 58 Mo. App. 5-10; Miller v. Major, 67 Mo. 247; Patterson v. Booth, 103 Mo. 418; Houts v. Shepherd, 79 Mo. 141; Hancock v. Blackwell, 41 S. W. Rep. 205; State ex rel. v. Strickland, Adm'r, 80 Mo. App. 401. (2) The settlements made in said probate court were *prima facie* correct, and the burden devolved on the plaintiff to show to the contrary, even if the petition

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justified in this collateral proceeding an inquiry as to the correctness of credits allowed therein. Myers v. Myers, 98 Mo. 262-270; R. S. 1889, sec. 5319; Clarke v. Sinks, 144 Mo. 448; Ladd v. Stephens, 147 Mo. 319. (3) Probate courts have exclusive jurisdiction over curators and guardians, and exclusive jurisdiction to pass upon their demands; have the discretionary power in regard to claims which are presented for services and for other things which are done for the benefit of the estate; and when said court has passed upon the same, in a collateral proceeding like this, the referee has no power to overrule the judgment of the probate court in respect to these matters. Const. Mo., sec. 34, art. 6; Rogers v. Johnson, 125 Mo. 213; Noland v. Barrett, 122 Mo. 188, 189; Leonard v. Sparks, 117 Mo. 108; Macey v. Stark, 116 Mo. 494; Williams v. Mitchell, 112 Mo. 308, 309. Brawford v. Wolfe, 103 Mo. 395; Price v. S. R. Est. Ass'n, 101 Mo. 118; Rottman v. Schmucker, 94 Mo. 143; Camden v. Plain, 91 Mo. 129; Bryan v. Mundy, 14 Mo. 459; Henry v. McKerlie, 78 Mo. 416; Brooks v. Duckworth, 59 Mo. 51; Johnson v. Beazley, 65 Mo. 250. And when assailed collaterally all presumptions will be indulged in favor of the findings of the court, that it did its duty in hearing evidence, etc. (4) Especially is this true, for the law presumes that every officer, as well as individual, performed his duty. Lenox v. Harrison, 88 Mo. 491; Yarnell v. Railway, 113 Mo. 579; State ex rel. v. Bank, 120 Mo. 169; Mathias v. O'Neill, 94 Mo. 528; 1 Phil. Ev. (C. & H.'s notes), p. 604, sec. 10; State ex rel. v. Williams, 99 Mo. 302 and cases cited; Henry v. Dulle, 74 Mo. 451, 452; Bush v. White, 85 Mo. 356; Long v. J. M. & S. Co., 68 Mo. 431; Hammond v. Gordon, 93 Mo. 226. *Omnia praesumntur rite et solemniter esse acta.* (5) The probate court had express authority to allow for all expenses "for the preservation of the estate," R. S. 1889, sec. 5319; also to allow such compensation as the court deemed reasonable and just. R. S. 1889, sec. 5334. This judicial discretion was

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of a kind not reviewable. Carr v. Dawes, 46 Mo. App. 598. (6) The circuit court committed no error in allowing credit to curator for interest paid on money borrowed from banks, and did not err in overruling referee on this point. The uncontradicted evidence was that $343.78 were paid in interest and that Ficklin, as agent, borrowed no money when he had funds on hand. (7) The circuit court committed no error in refusing to charge curator with $51.33, for road taxes. (8) The acts of Elliott as curator, in good faith, in the exercise of his discretion will be upheld and sustained; only ordinary care and prudence were required. Mosman v. Bender, 80 Mo. 579-584; Gamble v. Gibson, 59 Mo. 596; Julian v. Abbott, 73 Mo. 580; State ex rel. v. Slevin, 93 Mo. 253. (9) Elliott, having acted in good faith in all of his transactions, which fact was found by the referee and approved by the circuit court, was entitled to his commission. Schoeneich v. Reed, 8 Mo. App. 356; Finley v. Schlueter, 54 Mo. App. 458; Julian v. Abbott, 73 Mo. 580. A rate of commission had been established by the probate court of Bates county, which was followed properly by the referee. (10) The referee's report as to finding of facts will not be disturbed if there is any evidence to support the same. Berthold v. O'Hara, 121 Mo. 88; Goetz v. Piel, 26 Mo. App. 634; Drug Co. v. Saunders, 70 Mo. App. 221. Where a finding of facts is made the appellate court may apply the law and affirm report as modified. Clark v. Phillips, 99 Mo. 550. (11) The court erred in sustaining plaintiff's exception as to commission on $3,787.44 transferred to Kentucky, and in refusing to allow curator's commission of five per cent thereon, to wit, $189.37. Clark v. Anderson, 10 Bush. (Ky.) 99; Layton v. Davidson, 29 Hun. 622; Matter of Jackson, 32 Hun. 200; Matter of Mason, 98 N. Y. 527; Matter of Crawford, 113 N. Y. 560. (12) The uncontradicted evidence showed that a fee of $500 would be reasonable for defending this action, and that a fee of $200 would be reasonable for attorneys' fees

for defending this action in the appellate court. The court erred therefore in refusing to sustain the allowance of $500 attorneys' fees by the referee; and also erred in refusing to allow a fee of $200 for defending this action in this court. Jacobs v. Jacobs, 99 Mo. 427; Scudder v. Ames, 142 Mo. 243; In re Est. of Meeker, 45 Mo. App. 186-197; Woerner on Guardians, p. 350, sec. 105. (13) The court erred in refusing credit for taxes paid above constitutional limit to the amount of $39.33, under the decision in 123 Mo. 72; especially for the reason that the evidence of Ficklin, who paid said taxes, showed he had no knowledge whatever of such taxes being illegal, and paid the same in good faith. Christy's Adm'r v. City of St. Louis, 20 Mo. 143; Scudder v. Ames, 142 Mo. 231, 232.

SMITH, P. J.—George Hamilton, a resident of the state of Kentucky, was the owner of about 1,500 acres of land in Bates county, this state. Archie L. Hamilton, a son of the said George Hamilton, likewise a resident of Kentucky, was also the owner of 340 acres in Bates county, adjoining that of his father. The said George and Archie L. Hamilton executed a deed of trust on certain described parts of said lands, so owned by them, to Jarvis & Conklin to secure a loan of $13,000.

Afterwards, in 1887, the said George Hamilton, by deed, conveyed said 1,500 acres of land to his son Archie L. in trust for the two minor children of the latter, namely: Amelia May and Archie L., Jr. In 1889, Archie L. Hamilton, Sr., died, after having first made his will by which he appointed the defendant, John M. Elliott, also a resident of the state of Kentucky, executor thereof; he also appointed said Elliott trustee of his personal estate. In 1890, the defendant Elliott came to this state and caused himself to be appointed by the probate court of Bates county, curator of the estate of the

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said two minors and gave a bond as such curator in the sum of $7,500 with the other defendant, Ashby Hamilton, as surety thereon. Elliott, in his quality as curator, took charge of the real estate, hereinbefore referred to, and received the annual rents thereof from 1890 to 1895. In 1891 and for the three succeeding years he regularly made his annual settlements of the estate of his said wards with said probate court. In 1896, he was removed by the order of the said probate court and, in his stead, the relator, Tygard, was appointed curator of the estate of said wards.

The relator brought this action against his predecessor on his said bond and in his petition he alleged, as a breach of the conditions thereof, that the latter, during the administration of his said trust, had received rents and profits from the said real estate amounting to $20,000, and had paid out no more than twelve thousand dollars; and that therefore there was a balance of $8,000 remaining in his hands, unaccounted for. The answer of Elliott admitted that he had received into his hands funds of his said wards amounting to $20,000, but alleged that he had paid out for them, and for their use and benefit, all the funds that had come into his hands. The answer further specially pleaded said three annual settlements, and claimed that the same were conclusive on the relator. It was therein further pleaded that in the administration of his said trust, he had transferred, in the aggregate, from himself as curator in this state to himself as trustee in Kentucky, the sum of $3,787.44, which sum he had paid out to the use and benefit of his wards, and for the preservation of their estate in Kentucky; and that he had made settlement of his accounts, as trustee, with certain designated courts of the latter state having jurisdiction of the subject-matter of said settlement, in which he had accounted for the entire amount of the fund transferred as aforesaid; and that the action of said courts was final and conclusive on the relator. It was further therein pleaded, that about one-half of the

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fund so transferred, as aforesaid, had been reported by him to the probate court of Bates county in his several annual settlements therewith.

It was further therein alleged, that that part of the funds coming into his hands as curator of said wards and not embraced in said settlements so made by him with said Bates county probate court, was paid for and in behalf and to the use of said wards to divers persons, as shown by an itemized account marked "E," and made a part thereof, amounting to $8,285.51; that the payments so shown by the said exhibit were just, reasonable and necessary for the preservation and protection of the estate of said wards in the states of Missouri and Kentucky. It was therein further alleged, that by the terms of the will of said Archie L. Hamilton, deceased, he devised the real estate hereinbefore mentioned to his two children—the said wards; that by the terms of said will, it was provided that all the debts of the said testator should be paid out of his estate; that there were certain debts incurred by the testator in his lifetime, which were a charge on his estate in Kentucky; that it became necessary to pay off and discharge the said indebtedness for the benefit of said wards' interest in said Kentucky real estate, and to that end, he, as curator of said wards in this state, did transfer to himself, as trustee of said wards in Kentucky, certain funds with which he paid off the said indebtedness, and thereby prevented a sale and sacrifice of said Kentucky lands; and that he accounted, and obtained credit therefor with the said probate court of Bates county, in his said settlements made with it, etc.

The reply admitted that the defendant Elliott had made the several annual settlements specially pleaded in his answer, but denied generally the other allegations therein contained. It further proceeds at great length to allege wherein certain items in the said annual settlements, and in said exhibit "E,"

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were illegal and improper charges against the estate of said wards.

The case went to a referee, who heard the evidence and made a report of his findings of fact and conclusions of law. Exceptions were filed to the report by both parties, some of which were sustained and some overruled. The court modified the report of the referee so that the finding and judgment was for relator in the sum of $476.57. Motions for a new trial were filed by both relator and defendant, which were severally overruled. The relator and the defendant have each sued out a writ of error, by which the cause is brought here.

I. The referee found that the defendant, in his quality as curator, had transferred from the funds of his wards in his hands in this state to himself as trustee of the estate of said wards in Kentucky, $3,787.44, but declined to allow him a credit therefor, for the reason that such transfer was made without first procuring an order of the probate court of Bates county for that purpose. The defendant's fourth exception, which challenged the correctness of this finding of the referee, was sustained, and a credit for the amount of the said transfer was allowed by the court to defendant. But the relator, in his motion for a new trial, does not make the action of the court in this respect one of the grounds therefor. In Home Savings Bank v. Traube, 6 Mo. App. loc. cit. 229, it is said: "The chief object of the motion for a new trial is that the attention of the trial court being expressly called to all exceptions taken to its action, an opportunity may be afforded for more careful examination and more mature deliberation, that errors may be corrected and new trials awarded, in many cases, without the delay and expense attendant upon an appeal. The State v. Marshall, 36 Mo. 400. Whether such a motion is necessary in case of a new trial by a referee, where the case has been referred to him to try all the issues, and where exceptions to his report have been passed upon by the

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court is a question which it might be interesting to discuss, did we consider the matter *res integra* in this state. The practice has been to file such a motion." State ex rel. v. Burckhartt, 83 Mo. 430; Long v. Towl, 41 Mo. 398; Collins v. Saunders, 46 Mo. 389; Rotchford v. Creamer, 65 Mo. 48. If the relator deemed the action of the court, in sustaining the defendant's fourth exception to the report of the referee, erroneous he should not only have made such action the basis of an exception, but should have also called the attention of the court thereto, in his motion for a new trial. The record does not show that this was done; and therefore the action of the court in allowing to the defendant as a credit the said amount of $3,787.44 is not subject to review by us.

II. The referee declined to allow the defendant credit for interest paid by him to the Adrian bank. To this action of the referee the defendant excepted. The court sustained the exception and allowed the defendant on that account, $319.28. The relator assigns this action of the court as error. The lands of the defendant's wards in this state were subject to an incumbrance of $13,000, as has already been stated. The interest was payable annually in July. The curator had no fund out of which to pay the same, except that derived from the rent of said lands. There was therefore not always money on hand with which to meet this annually accruing interest. To prevent a sale of the land, on account of default in the payment of the interest, the defendant conceived it to be his duty, and for the best interest of his wards, to borrow the needed money with which to pay such interest. This he did. He reported the same to the probate court and was allowed a credit therefor by that court in his annual settlements.

These annual settlements were not conclusive, but were *prima facie* evidence of the correctness of the account therein stated. This is now the established law in this state. Myers v. Meyers, 98 Mo. 262; State v. Strickland, 80 Mo. App. 401. The defendant's annual settlements showing that the probate

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court had allowed his a credit therein for such interest was *prima facie* evidence that it was correct, and unless the relator showed that the same was improper the defendant was entitled to a finding in his favor as to that item. No evidence is disclosed by the record, impeaching its correctness on any ground.

It is contended by the relator that if the defendant had not transferred said $3,787.44 to Kentucky that there would have been money in his hands with which to meet the interest on the said $13,000 note, and therefore no occasion for borrowing money for that purpose. We may assume that the money was authoritatively transferred to Kentucky, and since it appears from the evidence that funds were needed in that state to prevent the sacrifice of the interests of the defendant's wards there, and since, too, it would seem that the fund on hand was not sufficient to protect the interests of his wards in both states, and that it was necessary to obtain a loan either in the one state or the other, it made little or no difference, so far as the interests of his wards were concerned, whether he borrowed in the one state or the other. He elected to procure the loan in this state, and we are not persuaded by the evidence that this operated to the injury of the estate of his wards, or that it was imprudent on his part to do so. It is not disputed that the interest was actually paid on the money borrowed to pay the annually accruing interest on the Missouri mortgage on the lands of the wards. The wards received the full benefit of the transaction. We are not of the opinion that the trial court erred in sustaining defendant's exception and allowing him credit for said item of interest.

III. It appears that the supreme court of this state in 123 Mo. 72, held that a certain tax that had been levied in Bates county was in excess of the rate allowed by the constitution. It further appears that the defendant, in ignorance of that decision, but in good faith, paid the tax and certain

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penalties that had accrued thereon. In his settlement with the probate court he was allowed a credit for both tax and penalty. There is no evidence in the record rebutting the *prima facie* correctness of this item. It is not shown that defendant did not act with that degree of care which cautious persons exercise in their own business. This was the measure of the defendant's duty. Jacobs v. Jacobs, 99 Mo. 427; Merritt v. Merritt, 62 Mo. 150; Scudder v. Ames, 142 Mo. 231. No reason is seen why the defendant was not entitled to a credit for the tax. He had a right to presume that the officers had performed their duties in extending the taxes on the tax book. He is not presumed to have known that the rate was in excess of that allowed by the constitution. It may be assumed that a very small per cent of the taxpayers of any community, in paying their taxes, stop to examine the rate of taxation levied against their property, or, if they do, are able to determine whether it is constitutional or not, or whether the tax they are called upon to pay was levied within the constitutional limit. It is not believed that any but those who are exceptionally cautious—above the average—make, or are capable of making such an investigation. A man may be a prudent and cautious man, and yet not take the precaution to make such an inquiry before paying his taxes. Unless the defendant was shown, as he was not, to have had actual knowledge that part of the taxes paid by him were illegal, we think the finding of the referee allowing him credit therefor ought to stand.

In the face of the evidence showing that the estate did not at all times have money on hand with which to pay the fixed charges against same, we can not say that the referee was wrong in allowing defendant a credit for the penalties which were charged on delinquent taxes paid by him. It is conceded that this item was allowed defendant as a credit in his annual settlement. This must be taken as *prima facie* evidence of its correctness. There is no rebutting evidence

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in the record tending to show that it was incorrect. The relator's fourth exception relating to the allowing of said illegal tax, amounting to $39.33, was improperly sustained. The defendant was entitled to a credit for this, as well as for $48.73, the amount of the penalty disallowed by the referee. The court therefore instead of allowing the penalty alone, should have allowed both tax and penalty paid by defendant.

IV. The referee allowed the defendant $500 as a fee for his attorneys in defending this action. It is inconceivable upon what theory this was done. According to the report of the referee, the defendant was in arrears to the estate of his wards in the sum of $3,851.91. If the defendant had discharged all his duties as curator of said wards and, in the main, had rendered a true account of his trust in his several settlements, he would, no doubt, have been entitled to the reasonable attorneys' fee required to be paid out by him in defending such settlements. But where it appears, as here, that he has not faithfully discharged all his duties, he is not entitled to an allowance for legal services. We do not think the statute contemplates the allowance for such service in a case like this. R. S. 1889, sec. 222; Jacobs v. Jacobs, 99 Mo. loc. cit. 436, and authorities there cited. Nor do we think the court erred in sustaining the relator's tenth exception and disallowing the said item of $500, allowed by the referee for "fees of attorneys."

V. The defendant was allowed by the referee the sum of $708.26 commission, and in which was included $189.37 —or five per cent on $3,787.44, the amount of money transferred to Kentucky. The relator excepts to said allowance, claiming that the defendant was not entitled to receive the same. It is conceded that the transfer was not made in conformity to provisions of the statute. R. S. 1889, secs. 5316, 5317. The transfer was made by the defendant and a credit was allowed him in his annual settlements for a part thereof. Whether in a case where a curator and his ward are nonresi-

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dents of this state, and the ward is entitled to personal property in this state, such property may be transferred to the state where the latter resides, is a matter resting, under the statute, largely in the discretion of the probate court in the state having jurisdiction of the estate of such ward. In re Wilson, 95 Mo. 184. The discretion of the probate court was not primarily exercised in the matter—no opportunity having been afforded it for the exercise of such discretion. It is true, after the transfer was made it recognized the act of the defendant as proper, or otherwise it would not have allowed him a credit in his settlements for the amount of the transfer so reported. The transferred fund was applied to discharge the burdens resting on the estate of Archie L. Hamilton, deceased, to which the defendant's wards were entitled, and therefore it was used for the purpose which it would ultimately have been applied had the transfer been made in the manner required by the statute. The fund thus transferred to the defendant in Kentucky was by him paid to the guardian of his wards in Kentucky, to the widow of Archie L. Hamilton, deceased, in conformity to a provision of his will, and to the executor of the will. It therefore seems the defendant's wards received the full benefit of the transferred fund, as fully as if it had been regularly transferred; and that, perhaps, was the reason why the probate court allowed defendant credit in his settlements for the reported amount thereof. The statute—section 5334—provides that, guardians and curators shall receive for their services such compensation as shall seem to the probate court to be just. The amount of such compensation is left very much in the discretion of that court. And we are not prepared to say that an allowance by the probate court, or by the referee of five per cent commission on the amount of the transferred fund was illegal or unjust. The relator's tenth exception to the report of the referee allowing the defendant said commission of $189.44 was improperly sustained.

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VI. The defendant was allowed by the probate court, in his first settlement, a credit for $64.50 for his expenses in coming to this state to qualify as curator for said wards. This, the referee disallowed, and rightfully so, too, as we think. We have been referred to no law or precedent authorizing such a charge. We think it was clearly illegal.

The referee disallowed a credit given defendant in his first settlement for $33.44 paid John Ficklin, agent. As there seems to have been no evidence adduced to overcome the *prima facie* correctness of this item, the referee should have allowed it. The court erred in overruling the defendant's third exception as to said last referred to item.

VII. The relator excepted to the report of the referee allowing defendant as credits certain items, viz.: $163, $362.50, $160, $388.87, $881.49, paid to J. C. Ficklin; also, $62.50, $197.82 and $139 paid to R. G. Tabor.

It was disclosed by the evidence that Ficklin, a resident of this state, had been long and favorably known to defendant as a faithful and capable business man. The latter selected the former to act in the capacity of steward to manage the estate of his wards in this state. It seems to be in effect conceded that the curator of these wards was entitled to the services of a steward in the management of the estate of such wards in this state. Not only was defendant but also the relator, the present curator, accorded by the probate court the right to employ such steward at the expense of the estate. It does not therefore seem to be questioned but that the defendant, in the exercise of the care and prudence exacted of him by law, was entitled to have the aid of a steward in the management of the said wards' estate. The concurrent testimony of the witness was mainly to the effect that his management of the estate was excellent. When the estate was placed in the charge of Ficklin there was no more than 440 acres of it in cultivation, the remaining 1,000 acres being in wild raw prairie, which he subsequently reduced to

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cultivation and made productive. If there was nothing else, the bare fact that during the six years period of his management the estate yielded rents and profits amounting to twenty thousand dollars, indubitably shows that he was an exceedingly careful, capable and faithful steward. The only question is, whether or not the compensation paid him was reasonable and fair. It appears that for the first year he received one hundred dollars, and one hundred and fifty dollars for each succeeding year—and necessary personal expenses, such as railway fare, hotel bills and the like, incurred by him while in the discharge of his duties.

It is contended that the services of a competent steward, residing much nearer the estate then Ficklin did, could have been obtained for the same, or less compensation. That had such a steward been employed by the defendant the items of his personal expense would be nothing, or at least much less than that incurred by Ficklin. It is true, Ficklin lived 150 miles from the estate and his several trips to and from same were not without cost to the wards, still it is more than probable that even with this expense it was more beneficial to the wards to have their estate under his management than under that of a steward living nearer. It is not every farmer who can successfully manage a farm embracing a quarter section of land that has the ability to manage an estate of nearly two thousand acres. It is very doubtful, indeed, whether a steward possessing the requisite capacity and integrity to successfully manage an estate of this magnitude could have been obtained for a less compensation than was paid Ficklin. It is very questionable whether the defendant would have been justified in selecting an untried steward residing near the estate, instead of one like Ficklin, whom he knew to be honest and capable, simply on account of the mere difference in compensation required. We hardly think it can be said that, under the circumstances disclosed by the evidence in this case, the action of the defendant in respect to the employment

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of Ficklin was not that which a careful and prudent man would have exercised in the management of his own affairs. There was, it seems to us, abundant evidence to sustain the finding of the referee as to the Ficklin items.

The finding of the referee is a special verdict. The reviewing courts will not go into the weight of the evidence, but will presume the findings to be correct, where there is no clear showing of mistake, if there is any substantial evidence to support it. Manufacturers, etc., v. Iron Co., 97 Mo. 38; Franz v. Dietrick, 49 Mo. 95; Father Matthew Society v. Fitzwilliams, 84 Mo. 406; Caruth v. Wolter, 91 Mo. loc. cit. 489; Daly v. Timon, 47 Mo. 516; Father Matthew Society v. Fitzwilliams, 12 Mo. App. 445. Applying the test of this rule and it is clear that the finding of the referee must stand undisturbed, both as to the Ficklin and the Tabor items. Nothing is seen in the evidence in any way justifying any interference with the finding of the referee as to the Tabor items. The evidence was gone into quite extensively in respect to both the Ficklin and Tabor items, and it is not seen that any injury resulted to the relator by reason of the action of the referee in receiving the same over his objections. No error was committed by the court in overruling the relator's first exception.

VIII. As to the relator's second exception, relating to the allowance of "$24.50, amount advanced for interest on 600 for seven months," it is to be observed that this item does not appear, or if so, not in such a way that we can identify it, in either of the exhibits pleaded in the defendant's answer, nor is there any evidence preserved touching the same; so that, it is our conclusion that it was improperly allowed by the referee.

IX. It does not seem to be disputed that the road tax referred to in the relator's third exception was properly levied against the real estate of defendant's wards, but it is insisted that the same was paid to an officer not authorized to receive

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it. It had been extended on the tax book in the hands of the county collector, who demanded and received it of defendant. It may be and no doubt was true, that this tax should have been collected by a township officer, but as it does not appear that it has ever been claimed by the township, or any officer thereof, or that the payment made by defendant did not discharge such tax, we are not willing, at this late day, to say that the defendant should be required to return the amount of such tax to the estate. Under the evidence we think the application of the rule just alluded to, in reference to special verdicts, may be properly invoked to sustain the finding of the referee as to this item.

X. The relator's seventh exception related to the finding of the referee that the defendant was entitled to a credit for $24.06, commission on $481.25 paid Emma Hamilton as the rent of the 360 acres of land of the wards, which was subject to her dower. This most manifestly was not an item of expense chargeable to the wards of the defendant, and should not have been allowed.

XI. The relator's exceptions eight and ten have been examined and were, as we think, properly overruled. And as to his eleventh, what has been said hereinbefore, in respect to another exception, will suffice for the disposition of it adversely to his contention.

XII. No doubt, many of the objections taken to the introduction of evidence before the referee might, with propriety, have been sustained; but we are unable to discover, from an examination of the report of the referee, that his failure to report any ruling thereon operated to the prejudice of the relator on the merits, or that the result would have been different if such rulings had been made and reported by the referee.

XIII. We think from an examination of the adjudged cases in this state that the action on the defendant's bond was properly brought. We have examined with considerable

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care the exceptions of both parties to the report of the referee, in connection with their motions for a new trial, and this examination has resulted in the conclusions hereinbefore expressed. We have paid no heed to objections and suggestions that have not for their foundation the action of the court referred to in both the exceptions and motions for new trial. The argument has taken a wide range. We have been invited in the briefs of counsel to go beyond the limits of the issues to consider questions of law and fact, which, of course, we have declined to do. Our conclusion is, that the report of the referee should be modified so as to conform to the views which we have hereinbefore indicated.

It is seen that we have not approved the ruling of the trial court in sustaining the relator's fifth and ninth exceptions, but as to its rulings on all the others, both of relator and defendant, referred to in its finding we have approved. Without repeating the several conclusions hereinbefore stated, it will be sufficient for us to state that the result is that the relator, instead of being entitled to $476.57, as found by the trial court, is entitled to $300.80.

The judgment for the former sum will be accordingly reversed and a proper judgment in lieu thereof will be entered here for $300.80. The cost of the appeal to be equally divided. All concur.

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WILLIAM L. EDWARDS, Respondent, v. MISSOURI RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Trial Practice;** SETTING ASIDE VERDICT: SPECIFIED GROUNDS. **The trial court in its order setting aside a verdict should specify of record the grounds for such action.**

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2. **Appellate Practice:** INSTRUCTIONS: HARMLESS ERROR. Where the finding is for the plaintiff and the amount of damages is the contention on appeal, defendant's instructions relating to the merits ana not to the damages, though erroneous, are harmless and will not warrant the setting aside of the verdict at plaintiff's instance.

3. **Passenger Carriers:** ACTION FOR ABUSE OF PASSENGER: EVIDENCE: APPELLATE PRACTICE. The evidence in support of an action for damages by a passenger arising out of his abuse by a co-passenger, is reviewed; and while it is probably insufficient to support a verdict for the plaintiff, yet the verdict can not be set aside in the appellate court on that ground since no such complaint appears in the motion for a new trial.

4. **Damages:** PERSONAL INJURY: INADEQUATE VERDICT: NEW TRIAL. In personal actions founded in tort and sounding merely in damages, a new trial will not be granted on the sole ground of the smallness of the damages. Exceptions to the rule noted.

5. **Trial Practice:** VERDICT: JURY V. COURT. Questions of fact are for the jury as questions of law are for the court, and the court can not usurp the functions of the jury.

Appeal from the Morgan Circuit Court.—*Hon. D. W. Shackleford*, Judge.

Reversed and remanded (*with directions.*)

W. S. Shirk for appellant.

(1) It is not the law of this particular case that if the judge below deemed the verdict against the weight of the evidence, it was within his discretion to set it aside and grant a new trial, and that such action of the court below will not be disturbed unless judicial discretion was abused. Here the verdict was for the plaintiff. The plaintiff filed his motion for a new trial, because the verdict which he obtained was against the evidence and the weight of the evidence. No

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case can be cited which sustains the action of the lower court in this case. Hewitt v. Steele, 118 Mo. 463; Bunyan v. Railway, 127 Mo. 12; Ittner v. Hughes, 133 Mo. 679, 689; Bradley v. Reppell, 133 Mo. 545; Thiele v. Railway, 140 Mo. 319; R. E. Co. v. McDonald, 140 Mo. 605; Thompson v. Railway, 140 Mo. 125; Jegglin v. Roeder, 2 Mo. App. Rep. No. 8, p. 498. (2) If such were the law, the action of the court in setting aside the verdict and giving plaintiff a new trial was a bold and flagrant abuse of judicial discretion. For the verdict is not against the evidence nor the weight of the evidence. The overwhelming preponderance is in favor of the defendant. (3) A new trial should not have been granted the plaintiff upon any grounds, for the reason that the defendant's demurrer to plaintiff's evidence should have been sustained. Sira v. Railway, 115 Mo. 127, 135, 136, and cases cited; 4 Elliott on Railways, sec. 1639.

W. M. Williams and *J. W. Jamison* for respondent.

(1) The record is full of the grossly insulting and abusive language used by Prewitt and it is unnecessary to repeat it here. Six of the seven witnesses that were examined on behalf of defendant testify that it was heard by them. Prewitt was one of them and he confesses to some of the indecent epithets which he used in his abuse of plaintiff. (2) Plaintiff testified that his ticket cost him one dollar and thirty-five cents. He was entitled to recover in addition to the sum paid for his ticket for mental suffering and wounded feeling. McGinnis v. Railway, 21 Mo. App. 399; Eads v. Railway, 43 Mo. App. 536; Farber v. Railway, 116 Mo. 81; Bryant v. Rich, 106 Mass. 180. (3) The verdict was inadequate and therefore against the weight of the evidence and "a self-respecting court" could do nothing less than set it aside. Watson v. Harmon, 85 Mo. 443; Lee v. Knapp & Co., 137 Mo. 385. (4) Another ground assigned in the motion for a new trial

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was that erroneous instructions were given at the instance of defendant over plaintiff's objection. It is the province of the court to determine what are the allegations of a petition, and defendant's instruction eight referring this matter to the jury was erroneous. Proctor v. Loomis, 35 Mo. App. 482; Clark v. Loan Co., 46 Mo. App. 248. Defendant's instruction numbered six was irrelevant to any issue in the case and should have been refused. Kauffman v. Harrington, 23 Mo. App. 572. "Error is presumptively prejudicial." Morton v. Heidorn, 135 Mo. 608. (5) If the action of the trial court granting a new trial can be sustained upon any ground stated in the motion, its action will not be reversed. Real Estate Co. v. McDonald, 140 Mo. 611; Bank v. Wood, 124 Mo. 72; Hewitt v. Steele, 118 Mo. 463.

SMITH, P. J.—It was in substance alleged in plaintiff's petition that he purchased of defendant a passage on its train of cars from the city of Jefferson to Eldon station, and thereafter entered a car of one of its trains on which there was one Prewitt, who was likewise a passenger; that while plaintiff was conducting himself in an orderly manner, said Prewitt, in the presence of divers persons, who were in said car, and in the presence and hearing of defendant's conductor and brakeman, then in charge of said car, at divers and sundry times cursed, abused and grossly insulted plaintiff, and threatened and attempted to cut him with a knife; and that he repeatedly called upon defendant's said conductor and brakeman to protect him from such insults, indignities and violence so offered him by said Prewitt, which they neglected and refused to do, so that he was compelled to leave said car at the station of Olean before he had reached that of Eldon, etc.; by reason of which he had been damaged in the sum of fifteen hundred dollars, etc. These allegations were put in issue by the general denial of the defendant's answer.

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The court gave for the plaintiff an instruction which covered very fully the affirmative of the issues made by the pleadings. The court also gave for plaintiff an instruction relating to the several items which the jury were authorized to take into consideration in estimating the damages, if it should find the issues for plaintiff. A number of instructions were given for the defendant. The jury, under evidence and instructions, found the issues for the plaintiff, and assessed his damage at the sum of one dollar.

The plaintiff thereupon filed a motion to set aside the verdict, assigning therefor these grounds, to wit: 1. Because the verdict is against the evidence and the weight of the evidence. 2. Because the court admitted incompetent evidence offered by defendant over the objections of plaintiff. 3. Because the court excluded legal and competent evidence offered by plaintiff. 4. Because the court gave illegal and improper instructions at the request of and on behalf of defendant, and over the objection of plaintiff. The court sustained this motion and ordered that the verdict be set aside; and from this order the defendant has appealed.

The trial court, in plain disregard of the requirement of the statute (Revised Statutes 1889, sec. 2241), neglected to specify of record the ground or grounds on which the verdict was set aside, and the new trial was ordered. We are therefore left to ascertain from the record, as best we can, on which ground of the motion the action of the court was based. Nothing is discovered in the rulings of the court in admitting or rejecting testimony to justify the conclusion that the verdict was overthrown by it on any ground of that kind. Indeed, there is no such claim made here by either party.

The plaintiff insists that the trial court erred in giving the defendant's instructions numbered six and eight, and that as this action of the court was assigned as one of the grounds of the motion for a new trial it was sufficient to justify the action of the court in granting the same. The issues made

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by the pleadings were found for the plaintiff, and as the defendant's said instructions six and eight did not relate to the measure of damages, and manifestly did not influence the action of the jury as to the *quantum* of damages found, it inevitably results that, even if irrelevant to the issues, as plaintiff contends, they were entirely harmless. The action of the court, therefore, in giving said instructions afforded the court no ground for disturbing the verdict. Pritchard v. Hewitt, 91 Mo. 547; Morris v. Railway, 79 Mo. 367; Gregory v. Chambers, 78 Mo. 294.

This brings us to the only remaining ground of the motion, to wit: That the verdict was against the evidence and the weight of the evidence. The plaintiff contends that the verdict was inadequate, and therefore against the weight of the evidence. The testimony of the plaintiff tended to establish the actionable facts pleaded in his petition, but he was not corroborated by any of the witnesses introduced by him. The concurrent testimony of all of them was to the effect that the trainmen, in charge of the train of defendant on which plaintiff was a passenger, as soon the misbehavior of Prewitt came to their attention, promptly took steps to prevent its recurrence, and gave plaintiff assurance that they would protect him against further molestation by Prewitt—and this, it seems, they did. All of the witnesses who were called by defendant gave similar testimony. Six or seven of the witnesses in the case testified that they were present in the car and heard the opprobrious epithets applied by Prewitt to the plaintiff, but none of them saw Prewitt exhibit a knife. Some of these witnesses occupied seats in the car either opposite or just behind that occupied by him, and yet did not see the knife which the plaintiff testifies that Prewitt exhibited. The testimony of no witness corroborated plaintiff's testimony that he left defendant's train at Olean while Prewitt was abusing him, and that the defendant's brakeman, then present, refused to interfere for his protection. The testimony of all

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the other witnesses was that Prewitt did not know that the plaintiff had left the train until some time after he had done so. Prewitt had previously subsided, and was at that time paying no attention whatever to plaintiff. It is made clear from the testimony of several of the witnesses that the reason why plaintiff did not continue on the train until he reached the station of his destination was, that Prewitt, during his misbehavior to plaintiff, had assured the latter that, when they reached Eldon that he intended to "kick the seat of his (the latter's) breeches." And for the worthy purpose of avoiding this assault, the plaintiff left defendant's train at Olean. This and not the continued abuse of plaintiff while on the train, was, it would seem, the true cause which influenced his action in leaving the train when he did. The testimony of all the witnesses was at variance with that of plaintiff in many material particulars. It is inconceivable how the plaintiff's testimony obtained any credence with the jury. How the jury, in the face of what seems from the record to be the overwhelming current of the evidence, reached the conclusion they did is one of the things which, to us, is inscrutable and unknowable.

But the plaintiff did not complain of the action of the court in finding the issues for him. His real complaint is, that the verdict is inadequate—too small in amount. The question therefore after all is, whether this is a ground on which the court's action can be sustained. It may be well questioned whether any ground assigned in the motion sufficiently raises the objection to the verdict for inadequacy. But assuming for our present purpose that it does so, can the action of the court be upheld on that ground? In personal actions like this, founded in tort and sounding merely in damages, a new trial will not be granted on the sole ground of smallness of damages. Gregory v. Chambers, *ante*; Pritchard v. Hewitt, *ante*; Watson v. Harmon, 85 Mo. 443; Colyer v. Huff, 3 Bibb. 34; Graham & Waterman on New

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Trial, 1165; Baylies on New Trial and App., 505. The reason for holding parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice. To the jury, therefore, as a favorite and almost sacred tribunal, is committed, by unanimous consent, the exclusive task of examining the facts and circumstances, and valuing the injury, and awarding the compensation in damages. The law that confers upon them this power and exacts of them the performance of this solemn trust favors the presumption that they are actuated by pure motives, and it is not until the result of the deliberation appears in form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion that courts have found themselves compelled to interpose. Pritchard v. Hewitt, *ante*.

This rule is not applicable to actions *ex contractu*, nor in those *ex delicito*, where the damages may be measured with some degree of certainty. And cases where the damages, under the circumstances, are such as to shock the understanding and induce the conviction that the verdict was the result of either passion, prejudice or partiality are likewise exceptions to the rule. Watson v. Harmon, *ante*; Lee v. Knapp, 137 Mo. loc. cit. 393. The case here is within the rule. No standard is furnished in the evidence by which the damage can be measured with any degree of certainty. There is nothing in the case to authorize the conclusion that the verdict was the result of passion, partiality or prejudice. The plaintiff contends that as he paid defendant one dollar and thirty-five cents railway fare that this furnished a certain standard for the measure of damages to at least that extent. The difference between one dollar—the amount of the verdict—and one dollar and thirty-five cents—railway fare paid

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by plaintiff—is so small as to appropriately call for the application of the maxim, *de minimis non curat lex.*

The court and jury differed on a question of fact. The latter we must presume to be right: *Ad quaestiones facti non respondent judices; ad questiones legis non respondent juratores.* If a verdict were to be set aside because it did not correspond with the views of the court as to the weight of the evidence it would be unsafe for the jury to render a decision until they had first ascertained the impression of the court. The former would invariably take its cue from the latter and it would be the verdict not of the jury but of the court. The authority of the judge upon questions of fact would thus become paramount, and the part enacted by the jury merely nominal. This would be subversive of all the advantages of trial by jury. If a verdict is to be overthrown because it does not entirely correspond with the judgment of the court, it would be better to abolish the trial by jury altogether, or, at least, require the court to inform the jury just what its opinion of the case is, and require them to find accordingly, and thus save the expense of a second trial. The theory of the trial by jury is, that they are better capable of judging facts than the court; and to secure to suitors the benefits of this blessing we must give them the advantage of their superior judgment. Kincaid v. Turner, 2 Gillman, 618; Sullivan v. Dallins, 13 Ill. 85. It seems that the action of the court in setting aside the verdict can not be sustained, either upon the ground that it was against the weight of the evidence or that the amount of the damages were too small, without sanctioning an invasion by the court of the province of the jury—which we are not at liberty to do.

We shall accordingly reverse the order of the court and remand the cause, with directions to enter judgment for the plaintiff on the verdict returned by the jury. All concur.

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HORACE SHOEMAKER, Appellant, v. HENRY CRAWFORD, Respondent.

Kansas City Court of Appeals, February 5, 1900.

1. **Landlord and Tenant: POSSESSION OF LEASED PREMISES; MEASURE OF DAMAGES: CROPPER. Where the lessor fails to give possession of the leased premises, the measure of damages is the difference between the actual rental value and the rent reserved But this rule has no application to a breach of a contract between a cropper and a landowner.**

2. **Contract: EVIDENCE: JURY QUESTION. On the evidence introduced in the record it was for the jury to say whether there was a contract between the parties and whether there was no compliance therewith by the defendant.**

3. **———: CROPPER: BREACH: MEASURE OF DAMAGES. The measure of damages for a breach of contract to furnish a cropper so much land to be cultivated on the shares is such injury as follows in the natural course of things and is reasonably supposed to have been in the contemplation of the parties as the probable result of the breach.**

4. **———: ———: EVIDENCE: DAMAGES. The damages for the breach of an agreement to furnish land to be cultivated on the shares should be ascertained by proving the value of the right to so cultivate the land; and the opinions of experienced farmers is competent. Such opinions can be sifted on cross-examination.**

5. **———: ———: ———: ———. Juries are allowed to act upon probable and inferential as well as direct and positive proof; and in an action for damages for a breach of contract between a cropper and landowner, it is competent to show the quality of the crop that was in fact raised on the land during the time covered by the contract.**

6. **———: ———: DAMAGES: POSSESSION. In an action to recover damages for the breach of a contract between a cropper and a landowner, it is immaterial whether or not the cropper entered and was ejected by the land owner.**

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Appeal from the Cooper Circuit Court.—*Hon. D. W. Shackleford*, Judge.

REVERSED AND REMANDED.

C. W. Journey and *W. G. & G. T. Pendleton* for appellant.

(1) The rule of damages which allows the difference between the actual rental value of leased premises and the rent reserved, applies exclusively to actions for the breach of lease contracts. This is self-evident. 3 Sedgwick on Damages [8 Ed.], sec. 1022, p. 211; 1 Sedgwick on Damages [8 Ed.], sec. 185, p. 269. (2) Such rule is therefore inapplicable to this case. The contract sued on, being for the letting of land upon shares, was not a lease. 1 Washburn on Real Property [4Ed.], sec. 365, p. 572; Moser v. Lower, 48 Mo. App. 85; Bishop v. Doty, 1 Vt. 38; Taylor v. Bradley, 39 N. Y. 129; 100 Am. Dec. 415; Adams v. McKesson, 53 Pa. St. 81; 91 Am. Dec. 183; Bernal v. Hovious, 17 Cal. 541; 79 Am. Dec. 147. The plaintiff, who was the cultivator in this case, had no interest in the soil or freehold. Moser v. Lower, 48 Mo. App. 85. And this is essential in order to constitute a lease. 1 Washburn on Real Property [4 Ed.], sec. 365, p. 572. (3) The measure of damages for the breach of a contract for the cultivating of land on shares, is the profit which the injured party would have made if the contract had been fulfilled. 2 Sedgwick on Damages [8 Ed.], sec. 624, p. 275; Hoy v. Gronoble, 34 Pa. St. 9; 75 Am. Dec. 628; McClure v. Thorpe, 68 Mich. 33; Taylor v. Bradley, 39 N. Y. 129; s. c., 100 Am. Dec. 415; Wolf v. Studebaker, 65 Pa. St. 461; Lawson on Contracts, sec. 459, p. 503. (4) The loss of such profits was also the natural and proximate result of the breach of the contract. Hughes v. Robinson, 60 Mo. App. 194; Lawson on Contracts, sec. 459, p. 503. (5) The trial court improp-

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erly excluded the evidence offered by the plaintiff to show the quantity of corn raised in the season of 1898 on the field which plaintiff was to cultivate in said season in the same kind of crop under the contract sued on; and the character and quality of the soil of said field; the quantity of corn said field was capable of producing in said season, and the equipment and ability of the plaintiff to cultivate the field the same as it was cultivated in said season; because such evidence was of facts and circumstances of the case having a tendency to show the plaintiff's probable damage. 1 Sedgwick on Damages [8 Ed.], sec. 170, p. 245; Stewart v. Patton, 65 Mo. App. 21; Goldman v. Wolff, 6 Mo. App. 490. The opinions of witnesses are competent evidence to prove the value of contracts like the one sued on in this case, by way of showing the damages caused by their breach. Taylor v. Bradley, 39 N. Y. 129; 100 Am. Dec. 415; Day v. Railroad, 22 Hun. 417; Reed v. McConnell, 17 N. Y. Week. Dig. 575.

Rutherford & Chambers and *W. M. Williams* for respondent.

(1) The refusal to carry out a mere verbal promise, without consideration, on the part of the defendant to let plaintiff have the land, would not give any right of action to plaintiff. Wesson v. Horner, 25 Mo. 81. (2) There was no meeting of the minds of the parties upon the terms of the contract. There was a mere talk about renting the land in January. Green v. Cole, 103 Mo. 70. (3) Plaintiff's complaint, even if there had been a valid contract between the parties, is not supported by the evidence. He could only have sued for a breach of the contract to let him have the use of the land, and not, as is done here, for a wrongful entry, with force and arms, upon plaintiff's possession by defendant. Plaintiff can not sue upon one cause of action, and recover upon another. Field v. Railway, 76 Mo. 614; Melvin v.

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Railway, 89 Mo. 106. (4) The rulings of the court were correct in regard to the measure of damages. Hughes v. Hood, 50 Mo. 350. 1 Sedgwick on Damages [8 Ed.], p. 268, secs. 184 and 185; Huiest v. Marx, 67 Mo. App. 418.

SMITH, P. J.—It is the well-settled rule of law in this state that where a lessor fails to give possession of the leased premises, the measure of damages is the difference between the actual rental value and the rent reserved. Hughes v. Hood, 50 Mo. 350; Huiest v. Marx, 67 Mo. App. 418.

But this rule is without application in the present case for here the evidence tends to show that the plaintiff and defendant entered into a verbal agreement by which the latter agreed to furnish the former 50 acres of corn land for the cropping season of 1898, to be cultivated on the shares. There was some evidence adduced which tended to show that the plaintiff, in the month of March, entered upon the land, cut the corn stalks standing thereon and while engaged in breaking it up, preparatory to planting, the defendant entered and forcibly drove him therefrom; so that he was thereby prevented from cultivating it. It was not in terms proved that the defendant formally put the plaintiff in possession of the land; yet, there were facts proved which would fairly justify the inference that the latter went to work on the land with the permission of the former. As to whether there was a contract by which the land was let on the shares, or whether there was a non-compliance therewith by the defendant were issues of fact which should have been left to the jury.

The vital question arising on the record is that respecting the measure of damages. Under the agreement, the plaintiff was not the tenant of the defendant. He was a mere cropper for the season, without any interest in the land, or possession thereof, beyond the mere naked right to enter the same to perform the labor which was required under the agreement. Moser v. Lower, 48 Mo. App. 85; Warner v. Hoisington, 42

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Vt. 94. If the defendant refused to furnish the plaintiff the land for said cropping year, this constituted a breach of the agreement for which the former was liable to the latter for such damages as may be fairly and reasonably considered either arising naturally, according to the usual course of things from such breach of the agreement, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the agreement as the probable result of the breach. Chalice v. Witte, 81 Mo. App. 84; Hadley v. Boxendale, 26 Eng. L. & Eq. 398. In a case of this kind the damages should be measured by what, if anything, the plaintiff could have made by the cultivation of the defendant's land, or, expressed in another way, "the value of the bargain."

In the well-reasoned and somewhat analagous case of Taylor v. Bradley, 39 N. Y. 129, it was said: "To my mind the only rule which can be prescribed, and the only rule which will do justice to the parties is, that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it, he must incur expense, submit to labor, and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit." And to this effect are other respectable authorities. Hoy v. Gronoble, 34 Pa. St. 9; Wolf v. Studebaker, 65 Pa. St. 461; McClure v. Thorpe, 68 Mich. 33; 2 Sedgwick on Dam., sec. 624.

The damages were fixed by the law of the agreement the moment it was broken. Wolf v. Studebaker, *ante*. The damages for the breach of the agreement must be ascertained by proving the true value of the right to cultivate the defendant's land during the said cropping season on the shares, as agreed. It is competent to prove such value by resorting to the judgment of men whose knowledge of the land and

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whose experience in farming and the like enables them to form a judgment on the subject. The opinion so expressed will be open to scrutiny. The cross-examination may draw out all the grounds of the opinion, and may go over all the conditions and uncertainties attending the cultivation of the land, even to the estimate in detail of all possible results of working the land and its expenses and contingencies. Such opinion must be formed in view of all the various uncertainties attending the operation of working the land; but it is a result based upon years of experience and observation with knowledge of the land itself, upon which the plaintiff must rely to prove the value of his contract. How much was the plaintiff's right to enter upon and cultivate the land, on the terms specified in the agreement, worth? Any answer to that question necessarily brings into the mind of any one proposing to buy the privilege, all that it cost him—labor, money or other sacrifice—to enter upon the performance, and perform the agreement on his part; and also all the uncertainty as to the result in producing value to him in return. Such privilege may be worth nothing. It may be worth more than the labor and expense attending it. This is the reasoning in Taylor v. Bradley, *ante*, which we adopt as applicable in this case.

At the trial, the plaintiff called several witnesses, who were farmers and well acquainted with the land in question, and asked them what amount of corn ought it to have produced, with average cultivation, in the year 1898. The court refused to allow the question to be answered, on the ground that it was incompetent for the reason that the measure of damages in the case was the difference between the rent specified in the agreement and the actual rental value of the land. This, in the light of the authorities already referred to, was an erroneous view of the law.

The court rejected the plaintiff's offer to prove the quantity of corn that was produced on the land in the year covered by his agreement. This, we think, was error. Juries

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are allowed to act upon probable and inferential, as well as direct and positive proof. And when from the nature of the case, as here, the amount of the damages can not be estimated with certainty, we can see no objection to placing before the jury all the facts and circumstances having a tendency to show damages, or the probable amount thereof, so as to enable it to make the most intelligible and probable estimate which the nature of the case will admit. If the rule were otherwise, though a party were to show he had sustained large damages his recovery would be limited to nominal damages only. The law will not sanction a rule that leads to such unjust results. 1 Sedgwick on Dam., sec. 170; Stewart v. Patton, 65 Mo. App. 21; Brandt v. Schuchmann, 60 Mo. App. 70; Goldman v. Wolff, 6 Mo. App. 490. What the land produced in the year 1898, and all the facts and circumstances relating to the same, were facts along with the other pertinent facts proved, which should have been put before the jury to enable it to draw the proper inference as to the probable value of the plaintiff's right to cultivate the land. There was, as we think, ample evidence adduced to entitle the plaintiff to a submission of the case to the jury under proper guiding instructions. This was denied him.

Whether the breach of the agreement consisted in the failure of the defendant to allow plaintiff in the first instance to enter upon the land for the purpose of preparing it for cultivation, or whether after the plaintiff had entered upon the same and cut the corn stalks standing thereon and begun to plow, defendant forcibly drove him from it and refused to allow him to cultivate it, is of no consequence since the measure of damages would be substantially the same in either case.

It seems to us that the statement of the case filed before the justice is sufficient.

It results that the judgment, which was for defendant, will be reversed and the cause remanded. All concur.

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GEORGE H. HOPPER, Executor, etc., Respondent, v. HAYS, WINTERBOWER & SIMS, Appellants.

Kansas City Court of Appeals, February 5, 1900.

1. **Contracts: CONSTRUCTION OF: LANDLORD AND TENANT.** Defendants in writing agreed to ship certain wheat raised by plaintiff's tenant and to hold the money until rent had been satisfied. In several ineffective proceedings against the tenant to recover the rent, plaintiff garnished the defendants. Held, the true meaning of the instrument is that the money was to be held by the defendants instead of the wheat on which the landlord had a lien for his rent, and the plaintiff so construed it by his garnishment of the defendants in his former suits.

2. **Conversion: LANDLORD AND TENANT: MISAPPLICATION OF RENT MONEY.** Where defendants holding money to secure the rent apply the same on the debt due them from the tenant, they thereby convert the landlord's security and are liable in damages therefor.

3. **———: LIMITATION.** A conversion occurred January 16, 1894, and suit brought April 15, 1898, was in good time even if the five year's limitation and not the ten year's applied.

Appeal from the Cooper Circuit Court.—*Hon. Samuel Davis*, Judge.

AFFIRMED.

J. W. Jamison and *W. M. Williams* for appellants.

(1) This suit can not be maintained on the ground that a landlord has an action against one who purchases the crops raised on the leased premises with notice of the existence of the landlord's lien. The case at bar does not come within the principle announced in Dawson v. Coffey, 48 Mo. App. 109, and the others of like character. The statute of limitations of five years would clearly bar such an action. (2) If

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defendants are liable to plaintiff upon any other ground, it must be based upon a contract upon their part to pay said money to plaintiff's decedent. No contract to pay the money to be received for the wheat to Hopper is expressed in, or can be implied from the writing dated September 10, 1892. The wheat belonged to Chenault, and was delivered to appellants by him. Hopper had a lien upon it for his rent. There was a dispute about the amount of rent due. Appellants agreed to hold the money for the wheat until the rent should be satisfied. It was evidently not intended that the money should be paid to Hopper by appellants. They did not promise to do so. If such was the understanding, why did not Hopper sue them instead of instituting action by attachment against Chenault and summoning them to answer garnishments as Chenault's debtors? (3) Plaintiff's case was barred by the statute of limitations of five years and the court erred in refusing the third declaration of law asked by defendants. Menefee v. Arnold, 51 Mo. 536; Bishop on Contracts, sec. 164. (4) It has never been determined what amount, if any, Hopper is entitled to recover from Chenault, on account of the dispute between them. The jury in the first suit before the justice, rendered a verdict for the plaintiff without fixing any amount. It is only where the jury find that some amount is due the plaintiff that the justice is authorized to enter a judgment in his favor upon said verdict. 2 R. S. 1889, sec. 278; Cates v. Nickell, 42 Mo. 169; Poulson v. Collier, 18 Mo. App. 585; Burghart v. Brown, 60 Mo. 24.

John Cosgrove and *James W. Cosgrove* for respondent.

(1) The question to be determined is: Does the writing sued upon come within the provisions of section 6774, R. S. 1889? It is not disputed but that this suit was instituted within ten years after execution of the writing sued

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upon; which writing was, in legal effect, a promise by Hays, Winterbower & Sims to pay Hopper the amount of money realized from the sale of the 178 sacks of wheat. Reyburn v. Casey, 29 Mo. 129; s. c., 31 Mo. 252; Moorman v. Sharp, 35 Mo. 283; Shelton et al. v. Wyman et al., 1 Mo. App. 130; Carr v. Thompson, 67 Mo. 472; Bridges v. Stephens, 132 Mo. 549. (2) Hays, Winterbower & Sims by the execution of the writing sued upon assumed the payment of the rent due from Chenault to Hopper to the extent of the amount realized from the sale of the 178 sacks of wheat. Hopper had a lien under section 6376, Revised Statutes 1889 on the wheat. This lien continued for eight months and allowed Hopper to follow the crop in the hands of Hays, Winterbower & Sims. Knox v. Hunt, 18 Mo. 243; Sanders et al. v. Ohlhausen, 51 Mo. 163; Dawson v. Coffey, 48 Mo. App. 109; Wayman v. Jones, 58 Mo. App. 313. (3) Appellants' construction of the contract sued upon is preposterous. According to it the agreement "to hold the money for said wheat until the rent has been satisfied" would permit them to forever withhold it from respondent.

ELLISON, J.—The following, taken substantially from the appealing defendant's statement, and being substantially made up from the agreed statement of facts, is a sufficient history of the present case.

James C. Hopper, whose executor brings this suit, rented sixty-two and one-half acres of land to J. M. Chenault, for a term ending January 1, 1893. The rental agreed upon was four dollars per acre, which was to become due on the date above mentioned. Wheat and corn were to be grown upon the land.

Chenault raised wheat upon a part of the land, which he harvested in the summer of 1892. A controversy arose between him and Hopper concerning a deduction which Chenault claimed on account of an overflow of that part of the land

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planted in corn. The wheat was ready to be shipped, and on the tenth of September, 1892, 178 sacks were delivered by Chenault to the firm of which the defendants were members, and they executed a writing in these words:

"We agree to ship 178 sacks of wheat from Terrapin Island, raised by J. M. Chenault on J. C. Hopper's farm and to hold money for said wheat until rent has been satisfied.

"Hays, Winterbower & Sims."

The wheat was shipped by appellants to St. Louis, on the thirteenth day of September, 1892, and they received $235 for it. This suit, which was not begun until April 15, 1898, is to recover said $235 and interest thereon.

Hopper, on the twenty-third of September, 1892, instituted a suit by attachment before a justice of the peace, to recover said rent, and in that suit H. Clay Sims and W. L. Hays, defendants, were summoned as garnishees. The case came on for trial on the eighth of October, 1892, and after the jury had been sworn, the defendant offered to file a plea in abatement, which the justice refused, and the defendant declined to appear further in the case. The jury returned a verdict in these words: "We, the jury find for the plaintiff." No amount was stated in the verdict. The judgment of the justice recites that it appearing from the evidence that plaintiff was entitled to recover $244, it was adjudged by the justice that he have and recover of the defendant said amount with his costs. The defendant afterwards filed a motion to set aside the judgment, claiming that it was rendered by default. This was sustained, and the case set for the twenty-ninth of October, 1892. The plaintiff failed to appear at that time, and the justice nonsuited him. No further steps were ever taken in that case. No judgment was rendered against the garnishees.

Hopper then instituted a new suit by attachment in the circuit court of Cooper county, returnable to the January

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term, 1893, to recover the rent which he had sued for before the justice of the peace in the action above mentioned. A writ of attachment was issued, and the appellants were summoned as garnishees. Hopper's deposition was taken in that case, and he stated that the justice would not issue an execution on the judgment of October 8, 1892, but attempted to set aside the verdict of the jury and the judgment, and to grant a new trial of the case, and that he (Hopper) ignored the justice, and brought this new suit in the Cooper circuit court. Interrogatories were filed in that case, addressed to Hays, Winterbower & Sims, the appellants in this suit, and who had been summoned, as above mentioned, as garnishees. These interrogatories were filed January 14, 1893. Chenault appeared, and upon his motion the writ of attachment was quashed, and the suit was subsequently dismissed.

Hopper subsequently instituted another suit in a justice's court, for the recovery of the rent, and failed to secure a judgment against Chenault in that action.

Chenault was indebted to Hays, Winterbower & Sims, in January, 1894, in the sum of $658, and on the sixteenth of that month Chenault directed them to give him credit for said $235, the money realized on a sale of the wheat by defendants, which they did.

Chenault sued Hopper upon the attachment bond, given in the first suit instituted before the justice of the peace. This court held that the judgment rendered by the justice was not a judgment by default, and that he had no right to set the same aside. State ex rel. v. Hopper, 72 Mo. App. 171.

On April 15, 1898, Hopper having died, his executor brought this suit to recover the amount received on the thirteenth of September, 1892, by appellants for the 178 sacks of wheat, referred to in the writing hereinbefore set out. Defendants denied all liability, and pleaded the statute of limitations of five years. The facts were undisputed, and a jury trial was waived.

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The court at the instance of the plaintiff, and over the defendant's objection, gave a declaration of law that upon the agreed facts the finding should be for the plaintiff, for the amount of money received by Hays, Winterbower & Sims for the 178 sacks of wheat, with interest thereon at six per cent from the commencement of the suit, and refused four declarations of law asked by defendants, declaring that the verdict of the jury, in the first case before the justice of the peace, having failed to find any amount in favor of the plaintiff, the judgment of the justice was void; that under the evidence in the case at bar the plaintiff could not recover; that the cause of action was barred by the statute of limitations of five years, and that the money for the wheat, after it had been received by Hays, Winterbower & Sims was due and owing to Chenault, and was not the property of Hopper, and that he could not recover it in a direct suit for the money against these defendants, but should resort to garnishment proceedings.

The court rendered judgment for the plaintiff for $246.05.

Defendants object to the judgment on the ground that the writing executed by defendants, which is above set out, is not an obligation on defendants' part to pay anything to plaintiff's intestate. That it is merely an agreement made with the consent of the landlord and tenant, whereby defendants, being permitted to ship and sell the wheat on which the landlord had a lien for rent, agreed to hold the money received for it until the tenant should pay the rent, or until the rent could be made out of it. We are inclined to take that view. The wheat was subject to the landlord's lien for the rent which was not yet due. It was therefore agreed that it might be sold and the money held by defendants in its stead. This must be the meaning of the writing. It is evidently the meaning plaintiff's intestate placed upon it for, in the several suits he brought prior to the present one, he sued the tenant

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and garnished the present defendants as having money in their hands belonging to the tenant.

So, therefore, treating defendants' written agreement as a contract to hold the money until plaintiff's rent was paid, we yet consider them liable to plaintiff as adjudged by the trial court for the reason that among other things appearing in the agreed statement of facts, is this: That the tenant being indebted to defendants in other distinct transactions, the latter appropriated this money, which they agreed to hold for plaintiff's benefit, as a credit on their account against the tenant. This was already an unwarranted proceeding on their part and in effect was a conversion of plaintiff's security, which they had agreed to preserve inviolate, and for which they are unquestionably liable in damages.

This unauthorized act of defendants was committed on January 16, 1894, and was within five years of the bringing of this action, so that if we accept defendant's theory that the five year and not the ten year statute of limitation applies, the action is still not barred.

The judgment will therefore be affirmed. All concur.

WILLIAM L. PAUL, Respondent, v. OMAHA & ST. LOUIS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Personal Injury:** FORMER ACCIDENT: JURY QUESTION: EVIDENCE: PRACTICE. **The record in this cause discloses abundant evidence to send to the jury the question whether plaintiff's injuries were the result of the accident sued for, or of a former accident; and the appellate court will not step between the defendant and the verdict.**

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2. **Appellate and Trial Practice:** WITNESSES UNDER RULE: EXPERTS. Whether experts shall be put under the rule and excluded with other witnesses from the trial, is addressed almost entirely to the discretion of the trial court and the appellate court will not interfere unless the record discloses a clear abuse.

3. ———: PERSONAL INJURY: EXAMINATION OF DEFENDANT. There is no absolute right to have a defendant examined in a personal injury case, but the trial court may in the interest of justice permit it, and its action is final unless accompanied with manifest abuse.

4. **Evidence:** PERSONAL INJURY: AVERAGE EARNINGS: DAMAGES. In a personal injury case the average earnings of the defendant where he has no fixed salary, are proper to go to the jury on the extent of his loss.

5. **Personal Injury:** EXTENT AND CHARACTER: INSTRUCTION: DEFENDANT'S DUTY. Defendant is not entitled to a verdict simply because plaintiff may fail to prove the extent and character of his injury and striking such word out of the instruction does not leave the jury to give substantial damages; and defendant is at fault if he so words his instructions as to make it necessary to refuse them.

Appeal from the Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

AFFIRMED.

J. G. Trimble for appellant.

(1) The court erred in excluding defendant's medical expert witnesses from the court room during the trial of the case. Our contention in this case is that the court's discretion was abused. So far as can be discovered from the decisions of this state, the question as to whether experts should be excluded from the court room has never been passed upon. Brown v. State, 3 Tex. Crim. App. 295, the court held that it was improper to separate expert witnesses. (2) The court erred in refusing to appoint the commission to examine the

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plaintiff as requested by defendant. This again is a matter that our courts have held to be within the discretion of the trial court, but our supreme court in the case of Fullerton v. Fordyce, 121 Mo. 1, intimates very strongly that it would have reversed the case because of the refusal of the court to appoint a commission to examine the plaintiff were it not that the case must be reversed for other reasons. (3) The court erred in admitting evidence of the probable earnings of the plaintiff, as testified to by him on page 24, and by his employers on page 97 to 106 of the record. There can be no recovery for damages resting upon contingencies and speculations. Connoble v. Clark, 38 Mo. App. 476; Turner v. Gibbs, 50 Mo. 556; Fisher v. Goebel, 40 Mo. 475; Saunders v. Brosius, 52 Mo. 50; Niemetz v. A. and M. Ass'n, 5 Mo. 59, 63. Nor can there be any recovery for probable earnings. Taylor v. Maguire, 1 Mo. 313; s. c., 13 Mo. 517; Mfg. Co. v. Clark, 32 Mo. 305; Lewis v. Ins. Co., 61 Mo. 534. The testimony admitted was not certain and definite. (4) The court erred in modifying instructions 1, 2 and 6 so as to allow the jury to find for plaintiff, although he had not shown the character and extent of his injuries.

William A. Harnsberger, *William H. Moore* and *Karnes, New & Krauthoff* for respondent filed lengthy argument.

ELLISON, J.—1. This action is for damages which plaintiff charges he has sustained by reason of personal injuries received while a passenger on defendant's road. The judgment in the trial court was for plaintiff.

Plaintiff entered one of defendant's cars as a passenger at the city of Maryville. In a few minutes after leaving that place the train became derailed and ran along and over the ties of the track about three hundred feet before it was stopped. The car on which plaintiff was riding was partially

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turned over—turned at an angle of forty or forty-five degrees. He claims to have had his breast bone badly hurt and to have received other internal injuries.

Two points in this case are practically conceded: First, that defendant was guilty of negligence, its track being in an unsafe condition. Second, that plaintiff was found to be injured. The only dispute is, whether he was hurt in the accident on defendant's road, or in an accident some months previous on another line of railway. Plaintiff concedes that he was in an accident prior to the one here sued for, in which his knee was severely injured, and that at the time of the accident now in question he was suffering therefrom so much that when he was thrown from his seat with his feet and leg wrenched and caught under a seat the pain of the old injury was so sharp and severe as to cause him, at first, to locate that as the sum of his injuries in this accident. But that it soon became apparent to him that he was not only suffering from a renewal of the old pain but that he was otherwise severely hurt, especially on the breat bone. Whether he was hurt further than a disturbance of the old wound, or injury of the knee, was really the controversy in the case. And in support of his assertion in the affirmative, there was abundant evidence. If he and many corroborating witnesses were believed there was but one course and that was a verdict for substantial damages. What he testified in his own behalf, added to what was given in evidence by others, was submitted to the jury along with all that was urged by defendant in disparagement of the truth of his story or the extent of his injury. It ought not to be expected that we will step in between defendant and the result on mere questions of fact.

2. But errors are complained of as having been committed by the court. At the trial the witnesses were excluded from the court room. Defendant asked that the rule be not applied to some physicians who were present on the part of

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defendant to give expert testimony. The court refused the request and excluded them with the others. The subject of this complaint is one of those matters which is entrusted almost entirely to the discretion of the trial court. It is only where the record discloses a clear abuse of such discretion that an appellate tribunal would feel justified in interfering.

"The court does not abuse its discretion in the slightest by subjecting medical experts to the operation of the rule." 1 Thompson on Trials, sec. 278. The learned writer continues: "The writer expresses the view with confidence that it is the better exercise of discretion to put such witnesses under the rule, since where they are permitted to remain in court during the trial, they are apt to form theories from the evidence, towards which their testimony will be directed, instead of its being directed in a colorless manner to the hypothetical states of fact which may be submitted to them by counsel on either side."

"The better doctrine is that they (experts) not only may be, but should be, excluded in a proper cause at the exercise of sound judgment." 2 Elliott Gen. Prac., sec. 562.

3. It is also urged that the court erred in not permitting an examination of plaintiff as requested by defendant. The request was not made until the afternoon of the second day of the trial, which was considerably more than a year after the accident and long after defendant knew of the nature of plaintiff's claim.

It was at first ruled in this state that there was no right to have an examination at the instance of the party charged with the injury. Loyd v. Railway, 53 Mo. 509. But it is now held that while there is no absolute right to have such examination, it may be had if the trial court should conclude it was best in the interest of justice; but that this was a matter in the discretion of the judge which will not be interferred with unless manifestly abused. Shepard v. Railway, 85 Mo.

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629; Sidekum v. Railway, 93 Mo. 400; Owens v. Railway, 95 Mo. 169; Fullerton v. Fordyce, 121 Mo. 1.

4. Complaint is made of the admission of evidence as to plaintiff's earnings before he was hurt. It seems that he was a travelling salesman and sold goods on commission and that he knew what his earnings had been averaging prior to his injury. Where the plaintiff does not receive a stated sum, such as daily wages or a fixed salary, his average earnings from his exertion, prior to the injury, may be considered. As was remarked by the trial judge, if such evidence was excluded there was no means whereby a jury could learn of the extent of an injured party's loss in this respect. Such evidence certainly tends to establish what his probable loss has been and it was proper to hear it. Griveand v. Railway, 33 Mo. App. 458 and cases cited; Stewart v. Patton, 65 Mo. App. 21; see also, cases from supreme court; Dougherty v. Railway, 97 Mo. 647; Gratiot v. Railway, 116 Mo. 450; Clark v. Railway, 127 Mo. 197. "They (the jury) are interested only in knowing what he did actually earn or what his services were reasonably worth prior to the time of his injury. In settling this question they should consider not only his past earnings or the fair value of services such as he was able to render, but his age, state of health, business habits and manner of living." Goodhart v. Railroad, 177 Pa. St. 1.

5. The defendant asked three instructions which declared, among several other things, that it was necessary for plaintiff to prove not only the accident and injury, but the character and extent of the injury, and if he had not the verdict should be for defendant. The court modified these by striking out the requirement of proof of "character and extent" of the injury. In view of the fact that the instructions contained an absolute and express direction to find for defendant, it was proper to strike out those words. For, plaintiff by reason of testimony of any injury and a consequent loss was entited to some damages, nominal, if nothing more.

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Defendant was not entitled to a verdict merely for the reason that the character and extent of the injuries received were not shown. Modifying these instructions did not have the effect to leave the jury to give substantial damages even if the character or extent of the injury was not shown, for the reason that other instructions placed the matter properly before the jury. But at any rate it was defendant's fault to so word its instructions as to make it necessary to refuse them as written.

In view of the instructions given for either side we can see no possible harm in the refusal of defendant's fourth.

A careful examination of the whole record leaves us without reason sufficient to justify an interference, and the judgment is consequently affirmed. All concur.

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82 506 89 77 C. J. TRACY & COMPANY, Respondent, v. JAMES C. McKINNEY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Jurisdiction:** CHANGE OF VENUE: SUCCESSION OF JUDGE: APPEARANCE. A change of venue was taken from a regular qualified judge. C. was selected to try the cause and presided at a mistrial. Before the next trial the legal successor of the regular judge succeeded to his office before whom the parties without objection appeared and went to trial resulting in a verdict and judgment. *Held*, the parties are precluded from raising the question of jurisdiction.

2. **Evidence:** BROKER: HOLDING PROCEEDS OF SALE: FRAUD: PLEADING. In an action against a commission merchant for retaining a portion of the proceeds of sales it is not necessary to allege or show a fraudulent intent, it is sufficient to show the act itself though it is well enough to allege and show fraud, if it exists, but it is error to admit evidence of other independent transactions to establish the fact of the retention or to show it was fraudulent.

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3. ——: **FRAUD: OTHER TRANSACTIONS: INTENT.** Where intent is an element in the cause of action evidence of collateral transactions is only received to characterize the act charged, but such evidence can never prove the act charged which must be shown *aliunde*.

Appeal from the Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

REVERSED AND REMANDED.

Ben. T. Hardin for appellants.

(1) This case must be reversed for the reason that Judge Gates had no jurisdiction to try it. Special Judge Carkener retained exclusive jurisdiction over the case, after he was elected. Bank v. Graham, 147 Mo. 250; 1 R. S. 1889, p. 828; Crossland v. Admire, 149 Mo. 655. (2) This is an action for conversion, and not a question of accident, intent or guilty knowledge. It was unnecessary to prove anything concerning the intent with which defendant did the act, and, therefore, wrong to plead it. R. S. 1889, sec. 2055. (3) And it was error for the court to admit in evidence the deposition of Robert Harper and the testimony of Metcalf and Brady, showing that Harper had trouble with the defendant, in other transactions at other times, and wholly disconnected with the case on trial. The intent or good faith of defendant is not an issue in this case; and that evidence was of collateral facts, and not relevant to the real issue in this case; the only question in this case is as to whether defendant sold the potatoes for more than he accounted for, and converted the surplus to his own use. No question of *quo animo* is involved. Mathias v. O'Neill, 94 Mo. 520; Holdberg v. Kahn, 76 Mo. App. 501; 1 Greenleaf Ev., sec. 53; 1 Wharton, Ev., sec. 29; 1 Phillips, Ev., star 748; Shippen v. Bowen, 122 U. S. 575; Johnson v. Gulick, 46 Neb. 817; Foley v. Holtry, 43 Neb. 133; Phillips v. Jones, 12 Neb. 213; Carter v. Glass,

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44 Mich. 154; Mackay v. Russell, 3 Wash. 378; Price B. P. Co. v. Rinear, 17 Wash. 95; Somes v. Skinner, 16 Mass. 360; Haskins v. Warren, 115 Mass. 514, 538; Comins v. Coe, 117 Mass. 45; Horton v. Weiner, 124 Mass. 92; Comm. v. Jackson, 132 Mass. 16; Comm. v. Damon, 136 Mass. 441, 448; Edwards v. Warner, 35 Conn. 517; Booth v. Powers, 56 N. Y. 22; Murfrey v. Brace, 23 Barb. 564; Strong v. Place, 33 How. 122. (4) Evidence of transactions other than those under investigation is admissible only for the purpose of proving the motive, intent or scienter. And such other transactions must be so connected in point of time, and be so similar in their other relations to the one under consideration, that the same motive may be reasonably imputed to them all. Davis v. Vories, 141 Mo. 234; State v. Myers, 82 Mo. 558; State v. Bayne, 88 Mo. 604; State v. Beaucleigh, 92 Mo. 490; Minx v. Mitchell, 42 Kan. 688; Map Co. v. Jones, 27 Kan. 177; Cary v. Hotailing, 1 Hill 311; Hall v. Naylor, 18 N. Y. 588; Murfrey v. Brace, 23 Barb. 564; Strong v. Place, 33 How. (N. Y.) 122; Ross v. State, 62 Ala. 224; Street v. State, 7 Tex. App. 5; McKenney v. Dingley, 4 Greenl. 172; McCasker v. Enright, 64 Vt. 488; Eastman v. Premo, 49 Vt. 355; Perkins v. Prout, 47 N. H. 387; Jordan v. Osgood, 109 Mass. 457; Bixley v. Carskadden, 70 Iowa, 726; Butler v. Watkins, 13 Wall. 456; Lincoln v. Claflin, 7 Wall. 132; Castle v. Bullard, 23 How. 186; Ins. Co. v. Armstrong, 117 U. S. 591; Ins. Co. v. Ins. Co., 51 Fed. Rep. 884.

R. F. Porter and *S. W. Moore* for respondents.

(1) There was a regular judge of a court of general jurisdiction, having jurisdiction of the subject-matter, and it is well settled that in such case if the parties go to trial without objection the question of jurisdiction is waived. Moore v. Railway, 51 Mo. App. 504; Fields v. Maloney, 78 Mo. 179; dissenting opinion adopted in 94 Mo. 317; Stearns v.

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Railway, 94 Mo. 317; Speer v. Burlingame, 61 Mo. App. 75; Cupples v. Hood, 1 Mo. 497; Bettis v. Logan, 2 Mo. 2; Ivy v. Yancey, 129 Mo. 501; State v. Gamble, 119 Mo. 427; Berkson v. Railway, 144 Mo. 211; Bensieck v. Cook, 110 Mo. 173; State v. Taylor, 132 Mo. 285; State v. Searcy, 46 Mo. App. 421. Counsel will not be permitted to invite error, and lead the court into it and then assign such error for reversal. Carlin v. Haynes, 74 Mo. App. 34; Guntley v. Staed, 77 Mo. App. 155; Tile Co. v. McGovern, 78 Mo. App. 513; Christian v. Ins. Co., 143 Mo. 460; Berkson v. Railway, 144 Mo. 211; Bensieck v. Cook, 110 Mo. 173; Johnson Brinkman Com. Co. v. Bank, 116 Mo. 558; Bank v. Armstrong, 92 Mo. 265; Loomis v. Railway, 17 Mo. App. 340; Hilz v. Railway, 101 Mo. 36. (2) Where a charge of fraud is involved which is largely a question of motive, the question of intent is relevant to the issue, and similar fraudulent transactions perpetrated at or near the same time are admissible to show the motive or intent. When fraud is involved in the issue other similar fraudulent transactions perpetrated upon other persons at or near the same time may be shown as tending to prove that the party was engaged in a general scheme or purpose of fraud and that the one in question is simply one of a class or system, and to show the general fraudulent purpose or scheme. Bigelow on Fraud, p. 146; Best on Evidence [Edition by Chamberlayne], pp. 487, 488; note c; 7 Ency. of Law, pp. 60-62; Castle v. Bullard, 23 Howard 172; Butler v. Watkins, 13 Wallace 456; Lincoln v. Claflin, 7 Wallace 132; Wood v. U. S., 16 Peters 342; Mudsill v. Watrous, 61 Fed. Rep. 163; Ins. Co. v. Armstrong, 117 U. S. 591; Ins. Co. v. Ins. Co., 51 Fed. Rep. 884; Blake v. Ins. Co., 4 L. R. C. P. Div., p. 44; Olmstead v. Hotailing, 1 Hill (N. Y.), 317; Hall v. Naylor, 18 N. Y. 588; 22 Minn. 287; Neff v. Landis, 110 Pa. St. 204; Wheeler v. Ahlers, 189 Pa. St. 138; Pa. Co. for Ins. v. Railroad, 153 Pa. St. 160; Thomos v. Miller, 151 Pa. St. 482; 12 Cal. 457, 465; 52 N.

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H. 569; Haskins v. Warren, 115 Mass. 514; Horton v. Wiemer, 124 Mass. 92; Fowler v. Child, 164 Mass. 210; 35 Md. 439, 461; Shoe Co. v. Adams, 105 Ia. 402; Eastman v. Premo, 49 Vt. 355; McCasker v. Mallon, 64 Vt. —; 30 Cal. 596; Bank v. Hatcher, 94 Va. 229; Meyberg v. Jacobs, 40 Mo. App. 129; Loan and Casualty Co. v. Baker, 54 Mo. App. 79; Manheimer v. Harrington, 20 Mo. App. 301; Davis v. Vories, 141 Mo. 234; State v. Wilson, 143 Mo. 334; State v. Williamson, 106 Mo. 162; State v. Mathews, 98 Mo. 125; State v. Jackson, 112 Mo. 585; State v. Minton, 116 Mo. 605; Massey v. Young, 73 Mo. 260; State v. Meyers, 82 Mo. 555; Seligman v. Rogers, 113 Mo. 654.

ELLISON, J.—This action is based on a claim of plaintiffs against defendant for a part of the proceeds of four carloads of potatoes, which defendant sold for plaintiffs. The judgment in the trial court was for plaintiffs.

I. The first objection defendant makes to the judgment is that the court rendering it had no jurisdiction of the cause. This objection is based on the following facts:

Judge Dobson being a regular qualified judge of the circuit court, the cause was pending and was tried before him. There being a mistrial defendant applied for and obtained a change of venue, the cause alleged being a disqualification on the part of Judge Dobson. Thereupon Stewart Carkener, Esq., a practicing lawyer, was selected, as provided by statute, to try the case. It was tried before him, resulting in a verdict for defendant. This verdict he afterwards, on plaintiff's motion, set aside and granted a new trial. In the meantime, Judge Dobson's term of office expired, and Judge Gates had been elected and qualified as his successor.

If we were to stop at this point it would be clear that under the recent ruling of the supreme court in the case of Bank v. Graham, 147 Mo. 250, Judge Gates had no jurisdiction or authority to try the cause, since Mr. Carkener having

been duly selected according to law remained the sole judge for that case.

But it appears that the parties appeared before the court presided over by Judge Gates, and defendants filed one or more motions in the cause which were passed on by the judge. That afterwards, the cause proceeded regularly to trial before him, resulting in the judgment now under review. That these proceedings and the trial itself were all had without objection or protest from defendants.

We therefore hold that as Judge Gates was a regularly qualified circuit judge presiding regularly over the division of the circuit court in which this case was, and that as such court was one of general powers with jurisdiction over the class of cases to which this belongs, the act of the parties in voluntarily appearing in such court before said judge and in voluntarily going to trial without objection, now precludes them, or either of them, from raising the question of jurisdiction. The following authorities, though not on this exact question, are in point. Moore v. Railway, 51 Mo. App. 504; Stearns v. Railway, 94 Mo. 317; Speer v. Burlingame, 61 Mo. App. 75; Ivy v. Yancey, 129 Mo. 501; State v. Gamble, 119 Mo. 427.

2. The petition charges that defendant, residing in Kansas City, Mo., solicited the sale of plaintiffs' potatoes, the latter residing in the state of Minnesota; that the defendant fraudulently induced plaintiffs to ship the potatoes to him to sell for them on commission with the intent to defraud them of the value thereof; that defendant received the potatoes in good condition when they were of the market value of seventy-five cents per bushel, and could have been and were readily sold at that price; that defendant fraudulently represented to plaintiffs that he had disposed of the potatoes at a price very much less than the sum he had in reality obtained for them, and that he remitted to plaintiffs the sum, less commission and drayage, which he falsely pretended they had sold for and

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fraudulently retained the difference. There were four counts in the petition, for four separate shipments of potatoes. Complaint is made that the court admitted evidence of other distinct transactions with other parties of a similar nature to that with plaintiffs.

It will be noticed that plaintiffs charge that defendant's act, whereby he sold the potatoes for more money than he remitted to plaintiffs, was fraudulent and done with intent to keep a part of the money which should result from the transaction. It is clear that the element of fraud or fraudulent intention is not necessary to plaintiffs' case, for defendant would be liable to them for the sum retained, even though it had been retained innocently, by accident, oversight, neglect or mistake. The fraud adds nothing to plaintiffs' right to recover their money from defendant. It being a fact that the act was fraudulent, it may not have been improper to so characterize it in the petition; but it was not necessary to do so. The petition would have been a good pleading without the adjectives if it had been based alone upon the act of defendant. If defendant had answered, denying any fraudulent purpose or intent, but admitting the fact of retaining the money charged to have been retained, is it not clear that plaintiffs could have had judgment on the answer?

That the question of fraud or fraudulent intent was immaterial to plaintiffs' right of recovery is well established. Shippen v. Bowen, 122 U. S. 575; Johnson v. Gulick, 46 Neb. 817. If in proof of the act, the fraud, being part thereof, makes its appearance it is, of course, unobjectionable. But to permit evidence of other independent and disconnected fraudulent transactions in order to establish a fraudulent intent where such intent is immaterial, is error.

Where a fraudulent intent is a necessary element in a case then other similar practices are admissible for the purpose of showing the intent. These questions frequently arise in both civil and criminal cases. The devices to hide a

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fraudulent purpose in civil transactions are as numerous as the excuses offered to avoid criminal responsibility, and so where the legal wrong depends upon the intent you may, in either case, show other similar acts for the purpose of characterizing the one on trial. In receiving stolen goods, burglary, passing counterfeit money, fraudulent pretenses, etc., the act is frequently admitted by the accused, but the excuse of innocent purpose is interposed. In such cases, other crimes or attempts of the same nature are admitted on that question. And the same is true of civil cases. Davis v. Vories, 141 Mo. 234; Wood v. U. S. 16 Pet. 342; Bottomley v. U. S., 1 Story, 135; Trogdon v. Commonwealth, 31 Gratt. 862. The text writers state the same rule. 1 Greenleaf on Ev., sec. 53; 1 Wharton's Ev., sec. 29; 1 Phillip's Ev., star 748. The foregoing authorities, as well as a large number to be found in defendant's brief, show that evidence of other fraudulent transactions of a similar nature are only admitted for the purpose of showing guilty knowledge or guilty intent. And, as before stated, where the intent is not a necessary element in the complainant's case such evidence is not proper.

3. But there is another consideration in this case arising on the question of evidence. Defendant complains that the evidence of other transactions similar to the one charged against him in this case was admitted, not merely for the purpose of proving an intent in the transaction, but the transaction itself. This is likewise clearly improper. For in cases where an intent or guilty knowledge is an element, such evidence of collateral matter is only received to characterize the act which has been otherwise shown. Thus, it is said by Lord Coleridge: "It seems clear upon principle that when the fact of the prisoner having done *the thing charged is proved*, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received

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must be admissible." (Italics ours). Queen v. Francis, 2 L. R. Crown Cas. 128.

And in Jordon v. Osgood, 109 Mass. 457, where the defendant was charged with making false and fraudulent representations to obtain goods of plaintiff, intending not to pay for them, it was held that evidence of other frauds was clearly not admissible to prove the act of making the false statements, though if properly connected, was admissible to prove the intent. Indeed, this idea pervades all the cases and is assumed to be the law, as a matter of course, about which there is no question. The numerous cases cited by plaintiffs support this statement.

Under the English system of jurisprudence you can never prove the act charged, to be a crime or fraud merely by the proof of some other distinct crime or fraud. You must prove the act *aliunde*, and then you may show it was a fraudulent act by proof of other similar frauds, or you may show the act of which you have given evidence is a part of a general scheme or system of fraud; in which case the other acts shown are so connected a series with the particular one charged as to form a part of it, or, at least, to characterize it. No more than this can be made out of the treatment of the question which Bigelow has given in his work on Fraud, vol. 1, page 160-166.

A is charged with stealing a horse. He is not seen to take him, nor is the horse found in his possession. Evidence that he stole other horses in the same vicinity is not admissible to prove the asportation of the horse in question. But, if after showing he did take the horse, it is yet a question whether his intention was felonious, you may on that question show he had stolen other horses under similar circumstances. So with this case (if fraud had been material) the fact that defendant sold potatoes for other parties and reported and accounted for a sale at a less price than he received would not be evidence that he sold potatoes for plaintiffs at a greater price than he reported

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and accounted for. The act charged to be fraudulent must be first shown, and then that it was fraudulently done may be shown by other similar frauds.

The judgment will be reversed and the cause remanded. All concur.

BAILEY GIBSON, Respondent, v. MISSOURI TOWN MUTUAL INS. CO., Appellant.

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Kansas City Court of Appeals, February 5, 1900.

1. **Insurance: SAFE: BOOKS: INVENTORY: WAIVER. Under the stipulations of an insurance policy, the insured had an option to keep his books and inventories in a safe in the building or in some other safe place; and the evidence fails to show any waiver of such stipulation before or after the loss as there was nothing done to change the insured's position.**

2. **———: STATUTE: THREE-FOURTHS VALUE: VALUED POLICY. Under the act of 1895 an insurance company is restricted from taking a risk at more than three-fourths of the value of the property insured; but when the value is fixed and the risk taken at a given amount, that sum can not be questioned and the policy is a valued policy for that amount.**

3. **———: ———: VALUED POLICY: DEPRECIATION. The fact that under the statute the policy is a valued one will not prevent the amount being reduced by depreciation, decay or salvage.**

4. **———: STATUTORY CONSTRUCTION: TOWN MUTUAL. The act of March 21, 1895, only relieves town mutual insurance companies from the operation of the general statute of 1889, and does not affect the act of March 18, 1895.**

Appeal from the Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

AFFIRMED SI.

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W. M. Bressler and *Fyke, Yates, Fyke & Snider* for appellant.

(1) Plaintiff's pleadings admit that he failed to comply with the conditions of the contract requiring him to keep books, showing his purchases and sales, and to keep the same in a safe place, secure from fire, which might destroy the building. There is no evidence whatever that there was any waiver of that condition. Consequently, so far as the stock of wines, liquors, cigars and tobacco is concerned, plaintiff is not entitled to recover and the court should have sustained defendant's motion for new trial. Crigler v. Ins. Co., 49 Mo. App. 11. (2) The court erred in permitting plaintiff to testify, over defendant's objections, that defendant's agent was frequently in plaintiff's saloon and had an opportunity to know that plaintiff had no iron safe. Such fact was no evidence of a waiver by defendant of the condition requiring plaintiff to keep his books in an iron safe or other secure place. (3) The instruction given by the court for plaintiff is clearly erroneous. Plaintiff was not entitled to recover the reasonable cash value of the fixtures and stock, not exceeding the amount insured. He was entitled to recover only three-fourths of the cash value of the property at the time of the fire, not exceeding the amount of insurance on each item respectively. Singleton v. Ins. Co., 45 Mo. 250; Blim v. Ins. Co., 85 Maine, 389; 2 May on Ins. [3 Ed.], sec. 425, p. 981. (4) The verdict is excessive. Plaintiff not being entitled to recover for the loss of the wines, liquors, cigars and tobacco.

Harkless, O'Grady & Crysler for respondent.

(1) Crigler v. Ins. Co., 49 Mo. App. 11; McCollum v. Ins. Co., 61 Mo. App. 352; Parsons v. Ins. Co., 132 Mo. 583; Okey v. Ins. Co., 29 Mo. App. 105; Herndon v. Ins. Co., 45

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Mo. App. 426; Wooldridge v. Ins. Co., 69 Mo. App. 413. (2) Forfeiture of policies of insurance is not favored and conditions which are claimed as forfeitures will be strongly construed against the party making them. McFarland v. Ins. Co., 124 Mo. 204; McCollum v. Ins. Co., 61 Mo. App. 352. This policy contained the clause that they should only be liable for three-fourths of its cash value. The legislature has provided for this matter. Session Acts 1895, page 194. Warren v. Town Mutual, 72 Mo. App. 188. In that case the court held that the law which exempted these Town Mutual Companies, to-wit, the laws of 1895, page 200, meant only to exempt them from the provisions of the law in chapter 89 of the Revised Statutes of 1889. The Act of 1895, page 194, applies to all companies in so far as it affects the three-fourths clause question, and hence there is no merit whatever in plaintiff's contention against the instruction as to the measure of the damages. And the instruction was correct in confining it to the "reasonable cash value," because that is precisely what the policy said upon the subject.

ELLISON, J.—This action is based on a policy of fire insurance issued to plaintiff, insuring his building for $300, his saloon fixtures for $300 and his stock of liquors, cigars and tobacco for $200, all in the town of Buckner. In the trial court the finding was for plaintiff, save as to the insurance on the building. Defendant appeals.

The policy contained the following provision: "In case the assured does not take an inventory of the stock hereby covered at least once a year during the life of this policy, and in the event that no inventory of such stock has been made within one year prior to the date of this policy, then the assured agrees to make such inventory immediately upon the acceptance of this policy, and shall keep books of account, correctly detailing all purchases and sales of said stock, and shall keep said inventory and books securely locked in a

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fire-proof safe, or in some place secure against fire, in another building, during the hours said store is not open for business, and in case of loss the assured agrees and covenants to produce such books and inventory whether the loss occurs during the hours the store is open for business or not, and in the event of failure to produce the same on demand, this policy shall be null and void, and no suit or action at law shall be maintained thereon for such loss."

It was conceded that plaintiff did not keep an iron safe; that he did not keep his books, accounts and inventories in any place away from the building; and that he did not keep any books of account correctly setting forth all purchases and sales of stock. The evidence shows that the only thing he had or kept was a small book which he carried in his pocket, and in which he put down, at night, the amount of cash he took in that day. And the evidence shows that after the fire defendant's agent demanded that he produce his books. In short, the case shows that there was no compliance with the clause of the policy above quoted and plaintiff relies, in support of the judgment, on a waiver by defendant's agents.

I. The evidence in the case fails to disclose anything tending to show a waiver. The defendant's agent, who took the insurance wrote the application and read it over to plaintiff. It was written in plaintiff's saloon, a room about 16 by 30 feet in size, and plaintiff testified that the agent could plainly see that there was no iron safe in it. If we concede that he could, it would not be evidence that plaintiff would not procure one in order to comply with his agreement. The contract was not that he already had a fire-proof safe in which to keep his books, but that he would (that is, after the taking effect of the policy) keep one. But plaintiff further testified that the agent was frequently, after that, in his saloon and could have observed that he did not have a safe. So, if we grant this too, still there is nothing to show that he was not keeping his books, etc., at some other safe place

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in another building, and thus complying with the contract. The provision for a fire-proof safe was not absolute. The contract was that he should keep one, or if he did not, that he would keep his books, inventories, etc., "in some place secure against fire in another building." Crigler v. Ins. Co., 49 Mo. App. 11.

But it is urged that forfeitures are not favored and that the policy, while providing that books and inventories shall be kept in a fire-proof safe, or in a safe place in another building, did not provide that it should be void if this was not done; that the only provision avoiding the policy was in case of loss and plaintiff failed to produce such books and inventories after a demand for them. Passing by all questions of warranty and all representations in application, and granting plaintiff properly construes the policy, the testimony of plaintiff himself shows that the books were demanded. The adjusting agent called for the books and plaintiff told him he had no books, that the only book he kept was the little book which he kept in his pocket in which he put down the amount of cash resulting from his daily sales. The agent told him he could not do anything for him; that his book amounted to nothing.

We are cited to the cases of Parsons v. Ins. Co., 132 Mo. 583, and McCollum v. Ins. Co., 61 Mo. App. 352, as supporting plaintiff's view of waiver. Neither of these has any application to this case, for the reason that this case lacks the essential facts which controlled those. In those cases the insurance companies, after a knowledge of the forfeiture, by their conduct induced and led the assured into further labor, trouble and expense under the idea that they would then be paid for the loss shown. Here, there was nothing whatever of that kind. The assured was not led into any expense, and nothing was done save to say to him, when it was discovered he had not complied with the policy, that he could do nothing for him. It is true that the agent asked for the policy and upon

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plaintiff telling him he had it in the hands of an attorney in Kansas City the agent asked him to send for it, that he did so and got it next morning. That the agent did not do anything the next day, as he was engaged with another party. Plaintiff says he told him he would see him about four o'clock.

"I went over and he says I think you and me can settle in a few minutes. I says Mr. Bressler, I hope we can; I don't want anything only what is just right. I went over and he says, I can not do anything this evening. I am looking for some important letters on the night train. He says I will see you in the morning. He says me and you can settle in a few minutes. A few minutes before the nine o'clock train came in the next morning, he came over and he told me, he says Gibson, I can not do anything for you."

Here nothing was done by the agent to change plaintiff's position the slightest. He sent for his policy, but that was only doing what his duty was. It was his duty to have the policy at hand, and it is not pretended that this act aided the waiver contended for.

Not having kept any books and inventory in a safe place as agreed; and not having kept any books at all of the kind agreed upon, and no waiver having been shown, it follows that plaintiff has no case as to the stock insured at $200.

2. As to the insurance of fixtures at $300, the defendant claims that as the policy provides that there shall only be a recovery of three-fourths of the actual cash value of the property, plaintiff should not have recovered more than three-fourths of the sum insured. Under the laws of 1895, page 194, the position is not tenable. That part of the enactment referring to this question is as follows:

"No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken its value shall not be questioned in any proceeding."

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We interpret this statute to enjoin upon the insurance company not to take a risk at more than three-fourths of the value of the property insured, but that when the value is fixed and the risk taken on a given amount that sum can not be questioned afterwards, though it should, in fact, be more than three-fourths of the value. So that the practical effect of the statute is to make a valued policy. It is practically the same, in this respect, as section 5897, of the general statute of 1889.

3. Though in respect to personal property, if a portion of it should be disposed of between the insurance and the loss, the value of such portion would be deducted from the loss, as it would be if a portion was saved from the fire. So if there was a depreciation in value from any of the variety of causes which affect property by use, decay or otherwise, as by accident or casualty, such difference in value arising by reason of an intervening cause should be allowed in fixing upon the amount of the loss. For this would not be a changing of value as fixed by the parties; the change would arise from a cause supervening; that is, outside the act of the parties.

4. But it is claimed that the law afterwards enacted at the same session (Laws 1895, page 200) exempts town mutual companies, such as defendant is, from the operation of the aforesaid act of 1895, page 194. The latter act is general and in terms applies to all insurance companies.

We held in Warren v. Ins. Co., 72 Mo. App. 188, that the terms of the act of 1895, page 195, in reference to furnishing blanks for proofs of loss, were general and included town mutual companies; and that the act of 1895, page 200, exempting mutual insurance companies from the operation of general insurance laws, did not exempt them from furnishing blank proofs of loss, since the act requiring all companies to furnish such proofs was general enough to cover all companies; and the exempting act only exempted them from the provisions of the general statute of 1889. So we hold in this case that the

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exemption act of 1895, in terms, only relieves town mutual insurance companies from the operation of such general statute, and that it does not affect the act of 1895, page 194, above set out. So therefore, notwithstanding section 5897 of the general statute creating valued policies and this later law of 1895 are practically alike, in that each makes a valued policy, as we have stated, yet the exemption act of 1895 is so worded that its effect is limited to the general statute only, and does not apply to the valued policy act of 1895.

It is proper to add that the effect of the latter act was not argued or brought to the attention of the court in Warren v. Ins. Co., *supra*.

We will therefore affirm the judgment if plaintiff will, within ten days, enter a remittitur of $200, and proportionate interest included in the verdict, this being the insurance on the stock. Otherwise, the judgment will be reversed and the cause remanded. All concur.

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82 522 | 84 346 MARGARET WALLIS, Respondent, v. CITY OF WESTPORT, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Municipal Corporations:** SAFETY OF SIDEWALKS: INSTRUCTION. A city is not required to make its sidewalks absolutely safe but only reasonably so, and instructions to the jury should make this distinction.

2. **Married Women:** DAMAGES: ORDINARY AVOCATION: HOUSEHOLD DUTIES. For personal injury to a married woman two causes of action arises: one to her for pain and suffering, etc., the other to the hubsand for loss of service, etc.; and the husband only can recover for injury disabling the wife from attending to the ordinary avocations of life which, in the absence of other evidence, will be presumed to be household duties.

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3. ——: ——: INSTRUCTIONS. An instruction permitting a married woman to recover for a permanent disability to perform the ordinary avocations of life is reversible error, especially where the verdict is somewhat excessive.

4. Trial Practice: INCONSISTENT INSTRUCTIONS. Instructions should be consistent.

Appeal from the Jackson Circuit Court.—*Hon. Edward L. Scarritt*, Judge.

REVERSED AND REMANDED.

Herbert S. Hadley and *R. B. Middlebrook* for appellant.

(1) While the question of damages in a personal injury case is peculiarly one for a jury to decide, yet the jury can not give any amount they please. The verdict in this case was excessive in the opinion of the trial court to the amount of $350, and is still excessive. Weinberg v. Railway, 139 Mo. 286; Franklin v. Fisher, 51 Mo. App. 345; Chitty v. Railroad, 49 S. W. Rep. 868; Haynes v. Trenton, 108 Mo. 123; Fairgrieve v. Moberly, 39 Mo. App. 31. (2) Instruction number 4, on behalf of the plaintiff, is error, in that it incorrectly states the duty of the defendant in reference to its sidewalks, and incorrectly states the right of the plaintiff to presume that the walk was safe, when there was nothing to show that she acted on that presumption. Nixon v. Railway, 141 Mo. 425; Kling v. Kansas City, 27 Mo. App. 231; Bassett v. St. Joe, 53 Mo. 290; Smith v. Brunswick, 61 Mo. App. 578. (3) The plaintiff, being a married woman, was not entitled to recover damages from her inability to perform her ordinary avocation of life, and there was no evidence to show that she had any avocation of life beyond that of keeping house for her husband, for the inability to perform which, her husband, and not she, was entitled to recover. Thompson v. Railway, 135 Mo. 217; Smith v. St. Joe, 55 Mo. 456; Ross v. Kansas City, 48 Mo.

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App. 440; McLean v. Kansas City, 2 Mo. App. Rep. 681; Madison v. Railroad, 60 Mo. App. 599; Bride Co. v. Schaubacher, 57 Mo. 582; Smith v. Railroad, 108 Mo. 243; Culberson v. Railroad, 50 Mo. App. 556; Duke v. Railway, 99 Mo. 347; Norton v. Railroad, 40 Mo. App. 647; Mammerberg v. Railway, 62 Mo. App. 563; Slaughter v. Railroad, 116 Mo. 269; Morris v. Railway, 144 Mo. 500.

C. W. Chase and *E. W. Shannon* for respondent.

(1) Under the circumstances the amount of the verdict is not excessive; certainly it can not shock the conscience of the court, and the injury being permanent, $1,400 is a small sum for such an injury. There is nothing in the record which shows passion, prejudice or improper motives on the part of the jury. Hollenback v. Railroad, 141 Mo. 112; Blackwell v. Hill, 76 Mo. App. 54; Hanlon v. Railroad, 104 Mo. 392; Franklin v. Fischer, 51 Mo. App. 345. (2) Instruction number 4, on behalf of plaintiff is in accordance with the instructions sustained by the supreme court in Burdoin v. Trenton, 116 Mo. 358, and in Roe v. City of Kansas, 100 Mo. 190; instructions numbers 1, 2 and 7 given for plaintiff and instructions numbers 1 and 2 given for defendant are without ambiguity and set forth fully the conditions under which the defendant could be held liable as well as the duties of defendant and plaintiff. If there was any error in instruction number 4 given for plaintiff, it is cured by the other instructions. A part of one instruction, or even one instruction, will not be picked out for possible error but all the instructions must be taken together. Burdoin v. Trenton, 116 Mo. 358; Roe v. Kansas, 100 Mo. 190; Caton v. Sedalia, 62 Mo. App. 227; Harrington v. Sedalia, 98 Mo. 583; Liese v. Meyer, 143 Mo. 547; Blackwell v. Hill, 76 Mo. App. 51, 52; Imp. Co. v. Ritchie, 143 Mo. 587; Barton v. Railroad, 52 Mo. 253; Mauerman v. Siemerts, 71 Mo. 101. (3) That part of

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plaintiff's instruction number 4, "The plaintiff had the right to presume that this duty had been performed and that the sidewalk was in safe condition for the use of the public, and was safe for any person passing on the same using ordinary care," is clearly a proper instruction, especially when read with the other instructions given for both parties. Burdoin v. Trenton, 116 Mo. 358; Roe v. City of Kansas, 100 Mo. 190; Caton v. Sedalia, 62 Mo. App. 227; Craig v. Sedalia, 63 Mo. 417; Kellny v. Railroad, 101 Mo. 77; McCormick v. Monroe, 64 Mo. App. 197; Moberly v. Railroad, 17 Mo. App. 542. (4) The clause objected to in plaintiff's instruction number 5, "her inability by reason of said injury to perform her ordinary avocations of life," goes to the extent of plaintiff's injury and is therefore proper. The same instruction was passed on in Burdoin v. Trenton, 116 Mo. 358, and was not there criticised. Evidence of such inability would be competent as showing the extent of the injury. Burdoin v. Trenton, 116 Mo. 358; Bigelow v. Railway, 48 Mo. App. 367, 377; Golden v. Clinton, 54 Mo. App. 118; Haniford v. Kansas, 103 Mo. 182, 183; Watson v. Race, 46 Mo. App. 546; St. Louis v. Brooks, 107 Mo. 380; Crabtree v. Vanhoozier, 53 Mo. App. 405; Harper v. Morse, 114 Mo. 317; Garst v. Good, 50 Mo. App. 149; Herman v. Owen, 42 Mo. App. 387.

SMITH, P. J.—This is an action which was brought by the plaintiff, a married woman, against defendant, a city of the third class, to recover damages for personal injuries received by the former in consequence of the negligent defect in a sidewalk in one of the streets of the latter. There was a trial in the circuit court resulting in a verdict for $1,750. The defendant filed a motion for a new trial, in which one of the grounds assigned therefor was that the verdict was excessive in amount. Pending this motion, plaintiff remitted $350 of the amount of the verdict; and thereupon the motion was

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overruled, and judgment given for $1,400—and from which defendant has appealed.

The evidence shows that the plaintiff, while walking on a sidewalk in one of defendant's streets was, by reason of a defect therein, thrown down with such violence that the thumb on her right hand was much injured, and in consequence of which she suffered considerable pain, etc. There was a stiffening, to some extent, of the thumb joint, which Dr. Ragan testified would probably be permanent. The plaintiff's ability to perform her household duties was lessened by the injury.

The defendant's principal ground of complaint here arises out of the action of the circuit court in the giving of instructions for the plaintiff, the fourth of which declared it to be the duty of the defendant "to keep its sidewalk in repair," and that "the plaintiff had a right to presume this duty had been performed and that the sidewalk was in safe condition for the use of the public, and was safe for any person passing on the same using ordinary care." This was an incorrect expression of the law. It was not the duty of the defendant to keep its sidewalks in an absolutely safe condition. It was only required to keep them in a reasonably safe condition. The instruction omits this qualification and in that it was wrong. Smith v. Brunswick, 61 Mo. App. 578; Kling v. City of Kansas, 27 Mo. App. 231; Bassett v. St. Joseph, 53 Mo. 290; Nixon v. Railway, 141 Mo. loc. cit. 436; Blake v. St. Louis, 40 Mo. 569; Smith v. St. Joseph, 45 Mo. 449.

The plaintiff's fifth instruction, to which the defendant objects, was erroneous in directing the jury that, in estimating the damages, if it found for plaintiff, to take into consideration not only the physical injury inflicted, bodily pain and mental anguish, inability by reason of the injury to perform her ordinary avocations of life, but that it might allow her for such damages as it appeared from the evidence would reasonably result to her from said injuries.

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It is alleged in the petition that, in consequence of the injury so received her thumb has been permanently and totally disabled, and her hand permanently injured, and rendered useless, whereby she was made sick and lame and unable to attend to the ordinary avocations of life, etc., by reason of which she was damaged, etc. The instruction was doubtless framed with reference to these allegations of the petition, and the question is now presented, whether or not "inability, by reason of the injury, to perform the ordinary avocations of life" is an element of damage which can be recovered by a married woman in an action of this kind. The law may now be regarded as well settled in this jurisdiction, to the effect that, in cases where a married woman receives personal injuries in consequence of the negligence of another, that two causes of action arise: one to her for the pain and suffering to which she is thereby subjected, and the other to the husband for the loss to him of her service, society and expense incurred by him in the treatment, etc., of her injuries. In this case the jury, by the instruction just referred to, were told that they might allow her damages for an element for which the husband alone could, as has been stated, recover. The evidence tended to prove that, in consequence of her injuries, she was disabled to perform her household duties.

It must be presumed, in the absence of any disclosure made by the evidence to the contrary, that her household duties constituted her ordinary avocation of life. The inability of the plaintiff to perform her household duties was a loss to the husband and not to her.

It may be inferred from the very large amount of damages found by the jury that it concluded that, as her disability might extend throughout the remainder of her life that it was its duty, under the instruction, to take that into consideration in estimating the *quantum* of damages to which plaintiff was entitled. The instruction, we think, was well

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calculated to mislead the jury. It was incorrect and should not have been given. Ross v. Kansas City, 48 Mo. App. 440; McLean v. Kansas City, 81 Mo. App. 72; Smith v. St. Joseph, 55 Mo. 456; Thompson v. Railway, 135 Mo. 217.

It is true, the court by its instruction number one, which was a modification of the plaintiff's number one, correctly told the jury that, "it was sufficient if the defendant's sidewalk was in a reasonable safe condition for travel in the ordinary modes," but this was inconsistent with the fourth and seventh given for plaintiff, which told it that it was the duty of the defendant to keep its sidewalk in good repair, so as to be in a safe condition for travel. The instruction given by the court did not cure the error referred to, which was contained in the plaintiff's two instructions.

It follows that the judgment must be reversed and cause remanded. All concur.

CHARLES BANISTER, Respondent, v. WEBER GAS & GASOLINE ENGINE COMPANY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Judgments: SISTER STATE: JURISDICTION. In an action on a judgment of a sister state, jurisdictional questions may be inquired into, though the record recites facts necessary to give jurisdiction.**
2. **———: JURISDICTION: EVIDENCE. On a review of the evidence and the dealing between the parties it is held that defendant had an agent in Texas and that service was regularly had on it under the law of that state.**
3. **———: CORPORATION DOING BUSINESS IN TEXAS: PERSONAL SERVICE. Held, that the evidence shows defendant was doing business according to law in the state of Texas at the time service was had on its agent, and that such service warranted a personal judgment against the defendant.**

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Appeal from the Jackson Circuit Court.—*Hon. Edward L. Scarritt*, Judge.

AFFIRMED.

Wash Adams and *Clarence S. Palmer* for appellants.

(1) We contend that the evidence does not substantiate the finding of the trial court that the Texas court had jurisdiction over the person of the defendant. Waddell v. Williams, 50 Mo. 216; Henry v. Bell, 75 Mo. 194, 199; Knapp, Stout & Co. v. Standley, 45 Mo. App. 268. (2) There is no question that this court is authorized to pass upon the jurisdiction of the Texas court. The service was not upon the defendant, but plaintiff claims was made upon its "local agent," and thus gave the Texas court jurisdiction. Defendant contends that it had no local agent upon whom service could have been made, and this is one question for the court to determine. (3) Even if the court should be of the opinion on the parol evidence offered that Canutson was defendant's local agent, yet the finding should be for the defendant, because it does not appear anywhere in the record itself that defendant corporation was engaged in business in the state of Texas. See Texas Law, Abstract of Record, page 26. St. Clair v. Cox, 106 U. S. 350; 2 Black on Judgments, sec. 910; Pennoyer v. Neff, 95 U. S. 714.

Stewart Taylor for respondent.

(1) It has been held that even where corporations have not complied with the statutory requirements directing the appointment of a local agent upon whom process could be served, that service upon a person who acts as its agent within the state is sufficient, for it will not be allowed to take advantage of its own illegality to escape service of process. St. Clair v. Cox, 106 U. S. 350; Ins. Co. v. French, 18 How. 404;

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March v. Railway, 40 N. H. 548; Gibbs v. Ins. Co., 63 N. Y. 114; McNichol v. U. S. Mercantile Agency, 74 Mo. 457; Hagerman v. Slate Co., 97 Pa. St. 534. (2) The question of agency of Canutson, as determined by the circuit court, is one of the weight of evidence which this court will not review. (3) If the agent was good enough to "handle" defendant's business in Texas, why was he not good enough to bring the defendant into court in a claim arising out of the very business transacted by him? Daggs v. Ins. Co., 136 Mo. 391; Gottschalk v. Feeding Co., 50 Fed. Rep. 681; Mack v. Tobacco Co., 67 N. W. Rep. 176; Mfg. Co. v. Ferguson, 113 U. S. 727; Iron Works v. Mining Co., 15 Colo. 499; Bateman v. Milling Co., 1 Tex. Civ. App. 90; Reed v. Walker, 2 Tex. Civ. App. 92; Diana v. Ins. Co., 13 Fed. Rep. 457; Norton v. Bridge Co., 51 N. J. L. 442.

GILL, J.—This is a suit on a judgment rendered in January, 1896, by a court of competent jurisdiction in the state of Texas. Plaintiff, a resident of that state, sued the defendant, a Missouri corporation, with its principal office at Kansas City, to rescind a contract for the purchase of a certain gasoline engine manufactured and sold by defendant, and to recover as damages the amount paid on the machine and other expenses incurred in the effort to make it operate as warranted. The defendant failed to appear before the Texas court, a judgment by default was entered against it for $1,340.42; and subsequently this action was brought in the circuit court of Jackson county, this state, where, on a trial before the court without a jury, plaintiff recovered and defendant appealed.

I. The sole question is whether or not the Texas court rendering the judgment upon which this action was brought, acquired jurisdiction of the person of the defendant. It is conceded that if such jurisdiction was obtained according to the laws of Texas, then the judgment is entitled to the same

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force and credit in this state as would be attached to it in the jurisdiction where it was rendered. It may be considered as the settled law of this state, that in actions on judgments of a sister state, jurisdictional questions may be here inquired into, even though the record sued on affirmatively recites facts necessary to give jurisdiction. Eager v. Stover, 59 Mo. 87.

II. Under the laws of Texas, introduced at the trial, it is provided, that "foreign, private or public corporations, joint stock companies or associations, not incorporated by the laws of this state, and doing business within this state, may be sued in any court within this state having jurisdiction over the subject-matter, * * * in any county where such company may have an agency or representative," etc. And further, that in such suit against the corporation of another state "citation or other process may be served on" (naming several officers) "or any local agent within this state of such corporation," etc. In the petition or complaint filed in the Texas court it was alleged that plaintiff Banister was a resident citizen of McLennan county, Texas; that the Weber Gas & Gasoline Engine Company was a private corporation duly incorporated under the laws of Missouri; "that said defendant corporation has an agency in said McLennan county, Texas, and that O. Canutson, a resident citizen of McLennan county, Texas, is the local agent and representative of said defendant in Waco, McLennan county, Texas." In the return of the sheriff who served the process, it was certified that he executed the same "by delivering to O. Canutson, local agent of the Weber Gas & Gasoline Company, a corporation, the within named defendant, in person a true copy of this writ."

By defendant's answer, filed in the Jackson circuit court, it was denied that Canutson, on whom the Texas process was served, was at any time the local agent for defendant; it was denied that defendant conducted a business in Texas or ever

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had an agent there upon whom process could be served. On this latter issue a large amount of testimony was produced before the trial judge, who, as already stated, found the same in favor of plaintiff. That finding is now the principal matter complained of—defendant's counsel insisting that there was no substantial evidence to prove that Canutson was defendant's local agent at Waco, Texas. After a careful consideration of the entire evidence, we must hold this point against defendant. This was a question of fact for the determination of the court sitting as a jury; and like the verdict of a jury, the court's finding must not be disturbed except in the absence of any substantial evidence to sustain it. This is not one of these cases. Other than that, it seems to us that the preponderance of the evidence is in support of the court's finding. The defendant corporation was engaged at Kansas City, Missouri, in the manufacture of gasoline engines. It sought to introduce these machines into the trade in Texas. For this purpose the defendant's managing officer entered into a correspondence with Canutson, the proprietor of a foundry at Waco, Texas, and induced him to take the exclusive agency for the sale of the engines in several counties tributary to Waco. To facilitate sales, the defendant sold to Canutson one of these engines, and it seems at a reduced price, and which was set up in the latter's foundry to be used as an exhibit to proposed customers. The agent was furnished with circulars and other advertising matter and requested to solicit trade. On each sale made within the territory Canutson was to receive a compensation, the exact amount of which is not clear. Thereupon several parties negotiated for the purchase of the engines. Some of these wrote directly to the factory at Kansas City and by the defendant they were referred to Canutson whom it designated as its agent at Waco. It is also shown that Canutson went so far as to execute in defendant's name certain written contracts of sale of the machine, designating himself as defendant's agent—and

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this too with the apparent knowledge and consent of the defendant. In short, throughout all the correspondence had between the defendant corporation and Canutson and between said company and the several customers residing in said agent's territory, said Canutson was regarded and treated as the agent and representative of defendant at Waco, Texas. We do not think the evidence justifies the contention that the relation between the defendant corporation and Canutson was that of vendor and vendee. On the contrary, the weight of the evidence, we think, shows that the relation was that of principal and agent, and so the parties themselves treated it. With the sole exception of the engine bought by Canutson for use in his own foundry and machine shop at Waco, the machines were negotiated for and purchased by the different parties from the defendant, and in its name—the said Canutson acting merely as a go-between or intermediate agent for the Kansas City corporation; he was a substitute or person employed to look after and conduct the business operations of the defendant corporation at and about Waco, and therefore its local agent.

III. It appears also on the face of the Texas record, and overwhelmingly by the evidence in the case, that the defendant was at the institution of the suit "doing business" within said state, as required by the statute. On the face of the petition there filed, it was alleged "that said defendant corporation has an agency in said McLennan county, Texas, and that O. Canutson, a resident citizen of McLennan county, Texas, is the local agent and representative of said defendant in Waco, McLennan county, Texas." This was a sufficient showing to support the jurisdiction of the Texas court to render a personal judgment against the defendant. It was at least sufficient to cast the burden on defendant to disprove these facts of jurisdiction. Having an agency there, and in the hands of a duly appointed agent, fairly implied the transaction of business.

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The numerous authorities cited by defendant have been examined, but we fail to find in any of them support for its contention here. The record clearly shows that the defendant corporation was conducting its business of selling its engines in the state of Texas; that its place of business was at Waco, Texas, where the defendant had a duly authorized and resident agent; that this agent was served with the process or summons directed by the Texas statute citing defendant to appear and answer plaintiff's complaint and more than this, that said citation was forwarded by the agent to his principal at Kansas City, but defendant saw proper to ignore the summons and failed to make answer. The defendant therefore has had its day in court and must abide the judgment regularly rendered against it.

We discover no cause to reverse the judgment entered by the court below, and it will therefore be affirmed. All concur.

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JOSEPH YEAGER, Respondent, v. GEORGE R. BERRY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Assault and Battery:** AGGRESSOR: EVIDENCE: INSTRUCTION. In an action for damages for assault and battery where the evidence tended to show mitigation and self-defense, it is improper to refuse an instruction directing the jury to consider previous threats and declarations of plaintiff together with his temper and expressions at the time of the difficulty; and the instruction refused in this case is not a comment on the evidence.

2. ———: COMPENSATORY AND PUNITIVE DAMAGES: INSULTING WORDS: MITIGATION. Words will not justify an assault nor mitigate compensatory damages; but matters of aggravation may be shown in mitigation of punitive damages.

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3. ——: COMPENSATORY DAMAGES: INTENTION. One guilty of an unlawful assault can not escape the damage he inflicts on the plea of the lack of intention to do as much harm as he did.

Appeal from the Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

REVERSED AND REMANDED.

Johnson & Lucas for appellant.

(1) The court erred in refusing to give instructions for defendant. Murphy v. Dott, 42 How. Prac. 31; 1 Am. and Eng. Ency. of Law [1 Ed.], 786; Gray v. McDonald, 28 Mo. App. 488; Nichols v. Winfrey, 79 Mo. 548. (2) The court erred in giving instructions for plaintiff. Morgan v. Durfee, 69 Mo. 476; Brownbach v. Frailey, 78 Ill. App. 262; State v. Palmer, 88 Mo. 572; Burke v. Melvin, 45 Conn. 243; Prentiss v. Shaw, 56 Maine, 427.

Grant I. Rosenzweig for respondent.

(1) It is proper to instruct that insults, etc., do not justify an assault. If defendant wishes an instruction that they do not mitigate, it is for defendant to ask for the same. Justification and mitigation are not the same things. 1 Waite's Actions and Defenses, 342; State v. Kaiser, 78 Mo. App. 575; State v. Rider, 90 Mo. 54; State v. Griffin, 87 Mo. 608; State v. Gamble, 119 Mo. 427; Murray v. Boyne, 42 Mo. 472. (2) The court will determine from the form of the verdict as compared with the instruction thereon whether or not the jury allowed punitive damages. Michael v. Matheis, 77 Mo. App. 556; Pope v. Ramsey, 78 Mo. App. 157. (3) Where one seizes or strikes another, it does not lie in the aggressor's mouth to say he inflicted greater injury than he intended. Brown v. Railroad, 66 Mo. 588. (4) It is only

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necessary to instruct the jury upon disputed facts. Russell v. Ins. Co., 55 Mo. 585. (5) In injuries resulting from a voluntary act, like trespass, breaking, conversion, etc., the word intent is not a necessary element in an instruction, where compensatory damages only are concerned. Cooley on Torts [2 Ed.], 104, 99 and 101; 1 Addison on Torts [6 Ed.], p. 124; Brown v. Railroad, 66 Mo. 588; State v. Kaiser, 78 Mo. App. 575; Vawter v. Hultz, 112 Mo. 633; State v. Hultz, 106 Mo. 41; Green v. Stephens, 37 Mo. App. 641; Patzack v. Von Gerichten, 10 Mo. App. 424; West v. Forrest, 22 Mo. 344; Morgan v. Cox, 22 Mo. 373; Conway v. Reed, 66 Mo. 346.

ELLISON, J.—This is an action for assault and battery in which plaintiff recovered in the trial court.

The petition prayed for compensatory damages in the sum of $3,000; and for punitive damages in the sum of $2,000. The evidence for plaintiff tended to prove an aggravated assault. The evidence for defendant tended to show mitigating circumstances, and also tended to show self-defense—that he did not intend to injure plaintiff and only attempted to prevent plaintiff from assaulting him; that plaintiff had previously threatened him and at the time of the difficulty was abusive.

In this state of the evidence the court refused an instruction offered by defendant, which directed the jury, in passing on the question of whether plaintiff first assaulted, or attempted to assault, the defendant, they should consider previous threats, his temper and expressions at time of difficulty, as well as his declarations as to the cause of and his purpose in the difficulty, as well as all other facts and circumstances in the case. This instruction should have been given. These were matters pertaining to plaintiff's own conduct and bore directly on the question of who began the difficulty; and un-

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der the evidence as developed were not a comment on testimony.

The court gave for plaintiff the following instruction: "5. The jury is instructed that, under the law, no mere language or epithets applied by one man to another, however obscene, indecent or insulting, can justify either man in laying violent hands upon the other; therefore, even if the jury believe from the evidence that Yeager first used bad language toward Berry before Berry laid hands on Yeager (if the jury so find), still the use of such language by Yeager, if it occurred is no defense to Berry in this action."

While it is technically true that insulting words will not justify an assault, and true that they are not a defense to the action, yet they are effective in mitigation of any action which embraces a punishment. And such is the present case; for plaintiff has not only sought compensation, but he has also asked to have defendant punished by an award of exemplary damages. Clothed in the phraseology the instruction is, it could only be understood by the jury, in the absence of anything explanatory, as a direction to throw all matters of abuse and insults on plaintiff's part out of the case. But to do that would be an injustice in a suit where damages over and above compensation are sought by way of punishment.

Words of provocation and insult will not mitigate compensatory damages resulting from an assault. But a distinction exists in this respect between compensatory and punitive damages. In the latter, matters of aggravation not amounting to justification, may be shown in mitigation. Prentiss v. Shaw, 56 Maine, 427. It is a principle of justice existing in every mind that one should not be punished so extremely for an injury inflicted under strong provocation as he would be for the same injury wantonly inflicted without any circumstances of excuse or palliation. Burke v. Melvin, 45 Conn. 246.

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Plaintiff insists that the verdict discloses that no punitive damages were allowed. But since the case is to be remanded for another trial it is of no importance to discuss such question.

Complaint is made of plaintiff's third instruction wherein the jury was told that if defendant made the assault by striking plaintiff in the face and by throwing him upon the floor, then he was liable in damages for all injuries inflicted, though he may not have intended them to be so serious as they turned out to be. We regard the instruction as proper. When one commits a wrong of the nature of an unlawful assault he can not escape the damage he inflicts on the plea of lack of intention to do as much harm as he did.

While there may have been some other instructions offered by defendant and refused which asserted correct propositions of law, yet those given in connection with those for plaintiff, with the exceptions which we have discussed, fairly presented the case to the jury.

The judgment will be reversed and cause remanded. All concur.

GEORGE W. DAY, Respondent, v. C. E. BURNHAM, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Garnishment: EXEMPTIONS: CLAIM. A debt due by one person to another is primarily subject to seizure under a constable's execution; but its selection is exempt under section 4905, Revised Statutes, 1889, exempts it as much as if it had been designated by section 4903 as specially exempt.**

2. **Judgment: ASSIGNMENT: GARNISHMENT: EXEMPTION: FRAUD. A judgment having been selected as exempt may be subsequently assigned by the plaintiff therein and such assignment is not fraudulent.**

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3. Justices' Courts: GARNISHMENT: JURISDICTION. A justice in a garnishment proceeding acquires jurisdiction of the debt by reason of the constable's seizure. On the constable's receipt of notice of exemption he should release the seizure and make return thereof, after which the justice is without jurisdiction and the garnishee who allows judgment to go against him is without excuse.

4. Executions: QUASHING: GARNISHMENT: EXEMPTION. The fact that the defendant in a judgment has allowed a garnishment judgment to be entered against him after the constable had been notified that the plaintiff in the judgment claimed that it was exempt, affords no ground for quashing an execution on the judgment or questioning its assignment.

Appeal from the Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

Elliott & Burnham for appellant.

(1) There was no valid claim of exemption from levy of this Burnham judgment by plaintiff, appellee Day. This property was not specially exempt as provided by section 4903, Revised Statutes 1889. It could only be exempt by proper selection in lieu of specially exempt property. There being legally no such selection, sale or assignment of the same so as to hinder, delay or defraud creditors is void. Bump on Fraudulent Conveyances, pp. 246, 620, 621. Garrett v. Wagner, 125 Mo. 450; Hombs v. Corbin, 20 Mo. App. 497; Hombs v. Corbin, 34 Mo. App. 393; Stotesbury v. Kirtland, 35 Mo. App. 148; State v. Koch, 40 Mo. App. 635; s. c., 47 Mo. App. 269; Stewart v. Stewart, 65 Mo. App. 663. After the assignment, Day can not make claim of exemption of this judgment for the benefit of his assignee, Rosenberger. Garret v. Wagner, 125 Mo. 450; Guntley v. Staed, 77 Mo. App. 164. (2) The assignment of the judgment is void because made by Day to his attorney, Rosenberger, with in-

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tent to hinder, delay or defraud Mrs. Hamlin in the collection of her judgment against him, and because Rosenberger took the assignment with guilty knowledge of such intent. There is clearly a secret trust here between attorney and client for either the whole amount of $88.88, or, at least, the balance of $44.44, and the assignment is therefore void. Dry Goods Co. v. McLaughlin, 78 Mo. App. 578; Gregory & Co. v. Simcox, 75 Mo. App. 148; Bank v. Lime Co., 43 Mo. App. 561; Allen v. Berry, 50 Mo. 90; Roberts v. Barnes, 127 Mo. 405; Martin v. Estes, 132 Mo. 402; Bank v. Powers, 134 Mo. 432; Bump on Fraud. Conv., pp. 199 to 209 and 486. If the assignment is void in part, it is void as a whole. Cordes v. Straszer, 8 Mo. App. 62; McNichols v. Rubleman, 13 Mo. App. 522; Hanna v. Finley, 33 Mo. App. 651; State ex rel. v. Hope, 102 Mo. 410; Boland v. Ross, 120 Mo. 208; Barton v. Sitlington, 128 Mo. 164; Implement Co. v. Jones, 143 Mo. 283. (3) If there is no fraudulent intent in the assignment, on the part of the assignee, then the assignment is void because it was voluntary and without valuable consideration. Wait on Fraud. Conv., sec. 200 et seq.; Bump on Fraud. Conv., pp. 267 to 272; 8 Am. and Eng. Ency. of Law, p. 759; Potter v. McDowell, 31 Mo. 62; Patten v. Casey, 57 Mo. 118; Hall v. Goodnight, 138 Mo. 587.

J. C. Rosenberger for respondent.

(1) A justice's execution is not a lien on property exempt from execution. Kulage v. Schueler, 7 Mo. App. 250; Hombs v. Corbin, 20 Mo. App. 497; s. c., 34 Mo. App. 397; Stotesbury v. Kirtland, 35 Mo. App. 148. This is so by the very terms of the statute. R. S. 1889, sec. 6305. (2) Mr. Day promptly availed himself of his exemption rights and the judgment sought to be sequestered was clearly exempt from execution after the selection made by Mr. Day. Moreover, he had a right to sell such exempt

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judgment, unaffected by the justice's execution. R. S. 1889, sec. 4903; R. S. 1889, sec. 4906; also cases cited *supra*; Hombs v. Corbin, 20 Mo. App. 497. (3) Besides, appellant is not a creditor. On the contrary he is Mr. Day's debtor. Not being a creditor, how can he complain that this assignment is in fraud of creditors? McLaughlin v. McLaughlin, 16 Mo. 249. (4) A motion to quash execution will not lie in a case of this kind. W. E. Burnham, the owner of the justice's judgment, does not appear at all. Why should C. E. Burnham concern himself as to whether this assignment is valid or invalid? The Garnishment Act makes provision for just such a case as this. R. S. 1889, sec. 5242; Potter v. Stevens, 40 Mo. 591; 15 Mo. App. 359. (5) In the first garnishment, which appellant concedes was void, the constable made the wrong declaration of attachment. After the second garnishment the constable undertook to cure the defect by amending his return of the first garnishment. This, it has been decisively held, can not be done. Gregor v. Carlson, 67 Mo. App. 179.

SMITH, P. J.—On February 25, 1898, a judgment was given by the circuit court in plaintiff's favor against defendant for $88.88. On April 16, 1898, the defendant was summoned by a constable to answer as a garnishee on an execution issued by a justice of the peace on a judgment in favor of Martha C. Hamlin against the plaintiff herein. The return of the constable showed that he had made the declaration required by subdivision 5 of section 543, Revised Statutes.

On March 16, 1898, the defendant in said execution, who is plaintiff herein, and who, it is conceded, was insolvent, gave the constable verbal notice that he was a married man, the head of a family, a resident of Jackson county, in this state, and that he selected and claimed the debt due him from the garnishee, the defendant herein, as exempt from

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execution and seizure under the provisions of section 4906, Revised Statutes. Three days later on, the plaintiff herein gave the constable also a written notice that he claimed and selected said debt under said last referred to section.

On March 26, 1898, the plaintiff assigned said judgment on the margin of the record thereof to J. C. Rosenberger, and on the same day an execution was issued on said judgment directed to the sheriff of Jackson county who levied the same on certain real property of the defendant. On April 2, 1898, the defendant filed a motion to quash the execution, on the ground that the assignment of the judgment on which said execution was issued was voluntary, without consideration and made for the purpose of hindering and delaying the creditors of the plaintiff in the collection of their just debts, and particularly the said judgment of the said Martha C. Hamlin against him and of which the said Rosenberger, assignee, as aforesaid, had full knowledge; that the said assignment was void, and therefore plaintiff was still the owner of said assigned judgment; that he had answered in said garnishment proceeding and that judgment had been rendered thereon against him.

It is not anywhere alleged or shown that the defendant as garnishee had discharged the said garnishment judgment. The court denied the defendant's said motion and gave judgment accordingly, and the defendant appealed here.

The debt due by defendant to the plaintiff was primarily subject to be seized and impounded under the constable's execution. But the moment the plaintiff claimed and selected said debt as exempt under the provisions of said section 4905, it was from thenceforth as much exempt as if it had been designated by section 4903 as specially exempt. In Hombs v. Corbin, 34 Mo. App. 393, we said that, when a debtor has exercised his right of selection under the statute the property so selected stands on the same legal footing as if specially exempted by it. The debt in dispute having been claimed and selected by the plaintiff as exempt from execution under the

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statute, and in consequence of which it acquired the status of exempt property, the subsequent assignment thereof by plaintiff was not fraudulent as against his creditors. Kulage v. Schueler, 7 Mo. App. 250; Alt v. Bank, 9 Mo. App. 91; Stotesbury v. Kirtland, 35 Mo. App. 148.

The justice acquired jurisdiction in the garnishment proceedings of the debt—the *res*—by reason of the seizure of the constable. On the receipt of the notice of the claim of exemption it was the duty of the constable to release the seizure and to make his return accordingly on the writ. The effect of the notice to the constable of the claim of exception was to withdraw the *res* from the jurisdiction of the court. After that, the court was without jurisdiction in the case. It could not rightfully give judgment against the garnishee. The garnishee as well as the justice was advised by the return of the constable of the existence of the conditions which excluded jurisdiction. If the court, against the will of the garnishee had persisted in rendering judgment against him, he had a plain and adequate remedy open to him. If he suffered a judgment to be rendered against him by the justice on the garnishment proceeding without appealing therefrom so that he will be compelled to pay the same he has no one but himself to blame therefor.

But whether or not there is a judgment in the garnishment proceedings against him or whether or not he has taken an appeal therefrom or will be compelled to pay the same affords no ground for quashing the plaintiff's execution. As far as we are able to see, the defendant neither in the quality of debtor nor creditor of the plaintiff can call in question the validity of the assignment of the judgment. There are a number of questions discussed in the briefs of counsel to which we have not alluded because the same are collateral and have no direct bearing on the question which we think to be decisive of the case.

The judgment of the circuit court will be affirmed. All concur.

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ORLANDER JENNINGS, Respondent, v. SAMUEL G. ROBINSON, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Forcible Entry and Detainer:** PARTY IN POSSESSION: TENANT. Forcible entry and detainer will not lie against the landlord when his tenant is in possession at the institution of the suit.

Appeal from the Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

REVERSED.

Cook & Cossett for appellant.

(1) Possession by the defendant, either in person or by servant, licensee or agent, at the time of commencement of the action is essential to the maintenance of this action. Orrick v. Schools, 32 Mo. 315; DeGraw v. Prior, 53 Mo. 313; Armstrong v. Hendrick, 67 Mo. 542. (2) Plaintiff having testified that Greene was in possession and had been so for months prior to the commencement of the action, can not recover in this action against defendant. Shirts v. Overjohn, 60 Mo. 305, 308; Foley v. Alkire, 52 Mo. 317; Moore v. Hutchinson, 69 Mo. 429.

Joseph McCoy and *L. H. Waters* for respondent.

(1) Plaintiff's possession was sufficient. He was in the peaceable possession. His acts indicated an intention to hold possession. Krevel v. Meyer, 24 Mo. 110; Miller v. Northup, 49 Mo. 397; Bank v. Clavin, 60 Mo. 559; School Dist. v. Holmes, 53 Mo. App. 487. (2) Whether the defendant was in possession of the scales tract at the commencement of

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this suit was a question of fact for the jury. DeGraw v. Prior, 53 Mo. 313; Blumenthal v. Waugh, 33 Mo. 181.

GILL, J.—This is an action for unlawful detainer brought before a justice of the peace June 14, 1898. The case was removed into the circuit court by *certiorari*, where a trial was had, resulting in a judgment for plaintiff and defendant appealed.

There is but one point that need to be considered. By the evidence of both sides it appears, without dispute, that when the suit was commenced the defendant was not in possession of the premises in controversy. The law is well settled that unlawful detainer, being a possessory action, must be brought against the party in actual possession, and can not be maintained against one not in possession.

The subject-matter of controversy is a small triangular strip along side of a tract of land owned and occupied by defendant Robinson and at the village of Raytown, Jackson county. The plaintiff had owned and maintained a set of wagon scales on the strip which was next to and adjoining defendant's inclosure. In November, 1897, Robinson set out his fence so as to inclose the strip with the balance of his land. When so doing he gave notice to plaintiff to remove the scales, but plaintiff refused so to do. In February following, Robinson leased his entire premises, including the strip in controversy, to one Greene, who at once entered into possession, and at the time the suit was commenced said Greene was in the actual and exclusive possession.

After making written demand of Robinson for restitution, plaintiff began this suit on June 14, 1898.

On this state of facts—which, as already stated, is undisputed—it is clear that plaintiff has sued the wrong party and can not maintain the action against defendant Robinson. Orrick v. Schools, 32 Mo. 315; Bell v. Cowan, 34 Mo. 251;

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DeGraw v. Prior, 53 Mo. 313; Armstrong v. Hendrick, 67 Mo. 542; Alt v. Hobbs, 62 Mo. App. 669. The Orrick case, above cited, is conclusive against the plaintiff in this action. It was there said: "The party in the actual possession of the premises detained at the time of the institution of an action of forcible entry and detainer is the one liable to the action." While admitting in that case that an ouster was shown, "yet," the court proceeds, "the evidence shows that before the suit was brought the defendants leased and delivered the exclusive possession of the premises in controversy to one Hollingsworth, who, at the institution of the suit, still held such possession; and he, therefore, and not the defendants, should have been sued."

The judgment of the circuit court must be reversed. All concur.

KAW BRICK COMPANY, Appellant, v. HOGSETT & WOODWARD, Respondent.

Kansas City Court of Appeals, February 5, 1900.

1. **Insurance: INSTRUCTION: ISSUE.** The issue presented by the pleadings and evidence was whether the defendants as insurance brokers had agreed to keep as well as procure a certain amount of insurance on plaintiff's plant. Plaintiff asked an instruction "that if defendants were the agents of the plaintiff for the purpose of keeping plaintiff insured," etc. These words the court struck out and in lieu thereof substituted "that if defendant agreed with plaintiff to keep plaintiff insured," etc. *Held,* the substitution was an improvement and no cause of complaint.

2. ——: ——: INDEFINITE LANGUAGE. An instruction telling the jury "that if defendants agreed with plaintiff to act generally as agents and brokers of plaintiff respecting its insurance," etc., is rightly refused as under the issues it is ambiguous.

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3. ———: PLEADING: EVIDENCE. A count in a petition against an insurance broker is reviewed and held to state a cause of action only for a failure to procure insurance as agreed and is found to be without evidence to support its allegations, and the complaint that the trial court erred in refusing by its instructions to submit said count to the jury is without foundation.

Appeal from the Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

R. E. Ball and *Botsford, Deatherage & Young* for appellant.

(1) The law presumes that all general employments like that of defendants by plaintiff as plaintiff's insurance brokers are at will, and the burden of proving an employment for a definite period rests upon him who alleges it. Mechem on Agency, sec. 210. (2) The fact of an agency may not only be proven by parol testimony, but also, as in this case, by the acts of the parties from time to time. Brooks v. Jameson, 55 Mo. 505; Rice v. Groffmann, 56 Mo. 434; Franklin v. Ins. Co., 52 Mo. 461; Hull v. Jones, 69 Mo. 587; Werth v. Ollis, 61 Mo. App. 401. The course of dealing on the part of defendants, and the conduct of both the insurance companies and of defendants in respect of the reinsurance of plaintiff's property, all show that not only the plaintiff but also the insurance companies, their agents, and defendants, as plaintiff's brokers, recognized defendants as the continuing brokers and agents of plaintiff. (3) Where the duration of any agency is not fixed by the contract, and it is made, as the evidence shows in this case it was made, for an indefinite length of time, the agent can only terminate the agency by giving reasonable notice to the principal. Burrows v. Cushaway, 37 Mich. 481; White v. Smith, 6 Lansing, 9; Story on Agency

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[9 Ed.], sec. 478; Mechem on Agency, sec. 233. (4) In as much as the testimony of defendant Woodward shows, without contradiction, the neglect of defendants to either reinsure plaintiff or to inform plaintiff of the fact of the insolvency of the California company after defendants learned that fact, the court below would have been justified in directing a verdict for the plaintiff on the second count of the petition, but whether this is so or not, it was certainly error for the court to refuse to submit the issue of neglect of duty on the part of defendant to the jury under said second count, as plaintiff asked in its seventh and tenth instructions.

Yeager & Strother and *Karnes, New & Krauthoff* for respondents.

(1) Now, if it be true that the defendants became the agents of the plaintiff by virtue of an express agreement of the parties, then the two instructions are exactly the same in meaning. But if it be intended that the agency was to be established by a course of dealing, then the course of dealing must be submitted to the jury and not the conclusion to be inferred therefrom. Whether the defendants were the agents of the plaintiff for the purpose of keeping plaintiff insured to the extent of $7,000 is a question of law if such agency is to be predicated upon a course of dealing. The conclusion of fact, and not the determination of the law, should be submitted to the jury. (2) Instruction number 10 asked by plaintiff was properly refused. It is based on the proposition that defendants agreed with the plaintiff to act generally as agent and broker of the plaintiff respecting its insurance for $7,000 on its plant in question. It is misleading. (3) The three instructions asked by, and given to, the defendants proceed upon the idea that the question in dispute in the case was whether the defendants undertook not only to procure $7,000 of insurance on plaintiff's said property, but to keep said property

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insured for that amount. It is the contention of the defendants that the evidence bore upon this proposition and none other. The correctness of the assertion is best shown by reference to the record itself. (4) That instructions must be predicated upon the evidence is thoroughly established, both upon authority and principle. Wilkerson v. Ellers, 114 Mo. 245; Paddock v. Somes, 102 Mo. 227; State v. Parker, 106 Mo. 217; Sparks v. Brown, 46 Mo. App. 529; Culberson v. Railway, 50 Mo. App. 556.

GILL, J.—The nature of this controversy may be learned by consulting the published opinion on a former appeal, 73 Mo. App. 432. It will be seen that it is sought to charge the defendants, who were insurance brokers, with the failure to keep certain property of the plaintiff insured to the extent of $7,000, as it is alleged they agreed; that they permitted a policy of a thousand dollars to lapse or become worthless by reason of the insolvency of the insurance company, of which defendants had knowledge; and that while the insurance was in that condition the property was destroyed by fire, and the plaintiff thereby lost to the extent of said worthless policy. At the former hearing, the judgment was reversed and cause remanded because of the erroneous action of the trial court in sustaining a demurrer to the evidence. We there stated, with some particularity, that portion of plaintiff's evidence which tended to prove that defendants undertook and agreed not only to place insurance in the amount of seven thousand dollars on the property but, at the same time, agreed to keep the same insured to the full extent of that sum in good solvent companies. It is now only necessary to add that at the last trial defendants introduced testimony denying that they agreed to keep the property insured and that the extent of their undertaking was simply to place insurance to the amount of seven thousand dollars. By reading our former statement of the

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case, along with what is here stated, a clear understanding of the controversy will appear.

I. In submitting the issues to the jury the court gave a dozen instructions which occupy several pages of the printed abstract. Of the ten offered by plaintiff, eight were given as asked, one given in a modified form, and one refused. At defendants' request three instructions were given. As to all these, it is sufficient to say that the jury was fairly, and in effect, instructed that if the defendants, as such insurance agents and brokers undertook and agreed with plaintiff not only to place but to keep its property insured in the sum of $7,000; that defendants entered upon such employment by taking out seven policies of insurance of $1,000 each in as many companies, and thereafter substituting two policies for that number canceled; that one of said policies thereafter and without plaintiff's knowledge became worthless by the insolvency of the company, which was known to the defendants prior to the fire, then defendants were liable for whatever loss plaintiff suffered in consequence thereof.

It is complained, however, that the court erred in modifying plaintiff's instruction number seven and in refusing its number ten. Instruction seven, as requested, is lengthy, and need not be fully quoted. Its main promise, however, is found in the first few lines reading thus: "The court instructs the jury that if you find from the evidence that the defendants were the agents of plaintiff for the purpose of keeping plaintiff insured to the extent of $7,000 against loss by fire on its plant," etc., and then, in effect, proceeds to state that if the defendants knew or had reason to know that one of the companies carrying the insurance became insolvent and failed to impart such information to plaintiff or otherwise to protect it, then defendants were guilty of negligence to the injury of plaintiff and the latter should recover.

The court amended this instruction by changing the words in the first few lines so as to read that: "The court

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instructs the jury that if you find from the evidence that defendants agreed with plaintiff to keep plaintiff insured," etc., instead of: "that the defendants were the agents of plaintiff for the purpose of keeping plaintiff insured," etc. We think there was no error in the court's action. In view of the evidence which tended to prove and to disprove that defendants were employed, not only to place but to keep seven thousand dollars valid insurance, it would be immaterial whether the jury was told that "if defendants agreed with plaintiff to keep plaintiff's property insured," or was told that "if defendants were the agents of plaintiff for the purpose of keeping plaintiff insured," to the extent of $7,000. To the ordinary mind, this, under the circumstances, would convey the same meaning. The test was, and would be so understood by the jury, what was the extent of the employment or agency? Was it that defendants should merely place the seven thousand dollars insurance or should they both place and keep the insurance up to that amount? Besides this, the court's expression was the better; it submitted in plain and unambiguous language a question of fact, while the instruction as asked left the jury to determine a question of law.

2. Plaintiff's instruction number ten was even more objectionable than the one just noticed and its rejection by the court was proper. It sought to tell the jury "that if you find from the evidence that defendants agreed with plaintiff to act generally as agents and brokers of plaintiff respecting its insurance for $7,000 on its plant in question," and thereafter served plaintiff in accepting cancellation of certain policies, had notice of the failure of one company and failed to advise plaintiff, etc., then plaintiff should recover. The doubtful import of the language used in that instruction was alone sufficient to warrant the court's refusal. What was meant by the statement that if defendants agreed to act generally as agents of plaintiff "respecting its insurance for $7,000 on its

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plant?" Was it to act as agents in merely obtaining or placing an insurance, or was it to act as agents in keeping up said insurance to that amount? "Respecting its insurance for $7,000 on its plant," is a clause subject to more than one interpretation. The instruction asked might well be claimed as meaning, that defendants were liable even though their agency was intended or agreed to extend only to procuring the insurance in the first place, which clearly is not the law. There is no pretense that defendants failed in their duty in procuring insurance at the time they were employed; the complaint is, that they thereafter neglected to keep $7,000 good insurance on the proprety.

3. Plaintiff's counsel complain that by the court's refusal of said tenth instruction and modifying the seventh, the plaintiff was deprived of the right to submit its case as founded on the second count of the petition. As we read and understand the second count, there was no evidence to support it. It is based on the alleged agreement of defendants to place or procure insurance to the amount of $7,000 on plaintiff's property, and not upon any obligation to keep up the insurance. As a basis of that count it is alleged, "that as such owner the plaintiff, desiring to have said property insured against loss or damage by fire, on November 23, 1892, employed the defendants as its agents and brokers, which employment was by defendants on said last day accepted, for the purpose of placing insurance on said property to the amount and extent of $7,000, and the said defendants agreed to act as agents and insurance brokers for the plaintiff in obtaining such insurance for plaintiff," etc. Stripped of unnecessary verbiage, the undertaking of defendants as there alleged, was simply that they (said defendants) would procure insurance on plaintiff's property to the extent of $7,000. It was not alleged in said count—either in form or substance—that defendants undertook or agreed to keep up the insurance. It is true that in a subsequent portion of said second count, the pleader deduces

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from the facts alleged "that said employment by plaintiff of defendants as its agents and brokers was a continuing one for an indefinite length of time, and that it became and was the duty of defendants as such agents and brokers of plaintiff to do and perform all such acts as should be necessary during the life of said policies in connection with the same, so that said insurances to the amount of $7,000 should, in the event of fire, be available and effectual as valid insurances in favor of plaintiff on said property to the amount of said $7,000." But such deductions are to be treated as mere declarations of law and are unwarranted by the facts alleged. There is not an allegation of fact within the four corners of this second count that justifies the claim that defendants undertook or agreed to keep up the insurance after it had been once procured. We think then that the second count was merely a complaint that defendants did not comply with their undertaking, there alleged, to wit: that they would procure $7,000 valid insurance on the property. And, as already stated, the evidence all concedes that defendants did procure the insurance as they agreed, and the only complaint, with any evidence to support it, was that they failed to keep the insurance up to the amount of $7,000. There was then nothing in the evidence that warranted a submission of the second count to the jury, and no instruction should have been given on that branch of the petition.

A patient examination of the entire record shows clearly that plaintiff had a fair trial of every substantial issue and the judgment should be affirmed. The other judges concurring, it is so ordered.

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G. W. CRAWFORD, Defendant in Error v. CASHMAN & SON, Plaintiffs in Error.

Kansas City Court of Appeals, February 5, 1900.

1. **Agistment:** REMOVING CATTLE FROM ONE PASTURE TO ANOTHER: NEGLIGENCE: NOTICE. The removal of cattle from a pasture where water had failed to one with water and good grass will not constitute negligence on the part of the agister when done in a careful manner; especially where the owner had notice thereof and did not object.

2. ———: NEGLIGENCE: PRIMA FACIE CASE. When it is shown that the agister received cattle in good condition and failed to return them in like condition a *prima facie* case of negligence is made and it rests on him to exonerate himself from liability.

3. ———: ———: PLEADING: EVIDENCE: VARIANCE. A petition against an agister alleged that a missing steer was lost by failure to maintain a good fence, or carelessness in moving cattle. The evidence shows the steer was killed by lightning or delivered to another owner. Held, that the variance was fatal and plaintiff can not recover since an agister is not an insurer and is not liable for the steer being taken by another where his owner consents to the division.

4. **Appellate Practice:** NON-PREJUDICIAL ERROR: AFFIRMANCE. Where no error materially affecting the merits of the action is committed, the judgment must be affirmed.

Error to the Pettis Circuit Court.—*Hon. George F. Longan*, Judge.

AFFIRMED.

John Cashman for appellants.

(1) Plaintiff's instruction numbered 3 was erroneous and at war with the law fixing the liability of agisters: The law which governs in this case is: The defendants made out

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a *prima facie* case of negligence by proving a delivery of the cattle in good condition and failure of plaintiff to redeliver on demand. Rayl v. Kreilich, 74 Mo. App. 246; Casey v. Donovan, 75 Mo. App. 665; Hadley v. Orchard, 77 Mo. App. 141; Casey v. Donovan, 65 Mo. App. 521; Mason v. Stock Yards Co., 60 Mo. App. 93; Thompson v. Railway, 59 Mo. App. 37; Cummings v. Mastin, 43 Mo. App. 558; Taussig v. Schields, 26 Mo. App. 318; Arnot v. Branconier, 14 Mo. App. 431; Witting v. Railway, 101 Mo. 631; Kincheloe v. Priest, 89 Mo. 240; Wiser v. Chesley, 53 Mo. 547. There was ample evidence to take the case to the jury under proper instructions, as negligence of the bailee is presumed from the mere fact of failure to redeliver on demand. (2) The plaintiff undertook to excuse his failure to return the one steer by setting up in his petition that this steer of defendants was killed by lightning. The plaintiff offered no proof of this, but on the contrary every witness who testified concerning this fact positively stated the dead steer did not belong to defendants. These facts being controverted the case should have gone to the jury. Rayl v. Kreilich, 74 Mo. App. 246; Hadley v. Orchard, 77 Mo. App. 141. The burden of proving that the steer was killed by lightning was on the plaintiff. (3) The court erred in giving instruction numbered 2 for the plaintiff. There was substantial proof that defendants' cattle were damaged $1 per head by the driving in the heat and dust and on account of the smaller pasture being inferior. The following authorities condemn the action of the court in giving this instruction as well as in the giving of instruction numbered 3. Lamb v. Railway, 147 Mo. 171; Baird v. Railway, 146 Mo. 265; Gannon v. Gas Co., 145 Mo. 502; Gratiot v. Railway, 116 Mo. 450; Kenney v. Railway, 105 Mo. 270; Tabler v. Railway, 93 Mo. 79; Huhn v. Railway, 92 Mo. 440; Keim v. Railway, 90 Mo. 314; Nagel v. Railway, 75 Mo. 653; Mauerman v. Siemerts, 71 Mo. 101; Norton v. Ittner, 56 Mo. 351.

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Barnett & Barnett for respondent.

(1) It can not be considered negligence on the part of plaintiff to remove defendants' cattle from a pasture where there was no water into one where there was water. He did what an ordinarily prudent man would do under like circumstances, and what Mr. Landers and Mr. Kelly, who had cattle in the same pasture, did with theirs. This was not only a prudent act, but an act of absolute necessity in order to save defendants' cattle. (2) But defendants were notified of this change, and did not object. That to which a person assents is not esteemed in law an injury. Broom's Legal Maxims, 204. (3) There is no evidence that the loss of defendants' missing steer was due to plaintiff's negligence; but on the contrary the evidence conclusively establishes that the missing steer was either killed by lightning or was gotten by one of the other cattle owners in the pasture, through the mistake of the defendants themselves in dividing the cattle. Of the steers placed in the pasture, all are accounted for. In order to charge an agister of cattle for the loss of an animal committed to his care, negligence must be shown; and the burden of showing such negligence is upon the bailor, the defendants in this case. Rey v. Toney, 24 Mo. 600; McCarthy v. Wolfe, 40 Mo. 520; Cummings v. Mastin, 43 Mo. App. 558; Casey v. Donovan, 65 Mo. App. 521; Witting v. Railroad, 101 Mo. 631. (4) An agister of cattle is only required to act with reasonable care and diligence, and in accordance with the usages and customs at the place where he does business. Stock Yards & Transit Co. v. Mallery, 157 Ill. 554. Agisters are not insurers of the cattle in their charge, but are liable only for negligence.

GILL, J.—This is a suit to recover for the contract price of pasturing cattle. The petition in effect alleges that plaintiff took forty head of defendants' cattle under contract to

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graze them in the summer of 1897, at at the rate of sixty-five cents a head per month; that one of the cattle was killed by lightning while they were in the pasture, but that the remaining thirty-nine head were grazed from May 1 to August 23, 1897, when they were removed by defendants. The answer admits the contract for pasturing, but alleges that plaintiff was to receive therefor only sixty cents a head per month. In addition to this, the answer sets up two counterclaims. In the first, it is alleged that plaintiff wrongfully and without defendants' consent moved the cattle from the 200 acre pasture, where they were originally placed, and drove them to another of plaintiff's pastures of only 70 acres where they were kept awhile and then returned, whereby the cattle lost in weight and were damaged to the extent of one dollar a head; while the second counterclaim denies that the missing steer was killed by lightning and alleges that the animal, of the value of $40, was lost through the negligence of plaintiff in failing to maintain good fences and gates thereby permitting the steer to escape, or that said animal was lost while moving the cattle from one pasture to another. The reply put in issue the matter set up in said counterclaims.

The verdict was for plaintiff, and from a judgment in accordance therewith defendants have appealed.

I. The only matters complained of relate to the action of the trial judge in peremptorily instructing the jury that defendants were entitled to nothing on the counterclaims above mentioned. As to the first counterclaim, that is, the one claiming damages for removing the cattle from one pasture to another, we feel no hesitancy in upholding the court's action. The evidence is undisputed that the cattle were placed, along with three other bunches owned by other parties, in one of plaintiff's pastures; that they all remained there till in the month of June, when the water supply failed because of dry weather, when plaintiff drove the entire herd into another of his pastures in the neighborhood where there was abundant

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water and good grass. In so doing the other cattle owners assisted, and the evidence quite conclusively shows that defendants had notice thereof and did not object. The cattle remained in the new pasture for two weeks—when a rain occurred, furnishing a supply of water, and they were then returned to the first pasture. There is no pretense that the cattle were carelessly handled and no substantial evidence that they were in any way damaged by the moving. The removal of the cattle, under the circumstances, can not be treated as a negligent act; indeed, to have done otherwise and kept them where there was no water would have been negligence. No prudent man would have kept the cattle where they would have suffered for want of water.

II. The next question is, whether any responsibility can fairly rest on the plaintiff for the loss of one of defendants' steers. It is conceded by both parties that defendants placed forty head of steers in plaintiff's pasture, and it is also admitted that only thirty-nine of these were returned. If the case rested here, it might be well contended that a *prima facie* case was made against plaintiff. For whatever may have been the law in this state, the rule seems now well settled that where the plaintiff has shown that the bailee received the property in good condition, and failed to return it, or returned it in an injured or damaged condition, he has made out a *prima facie* case of negligence, that it rests "upon the depositary to exonerate himself from the liability which attached when he assumed the custody of the article with which he was entrusted." Wiser v. Chesley, 53 Mo. 547; Arnot v. Branconier, 14 Mo. App. 431; Cummings v. Mastin, 43 Mo. App. 558; Casey v. Donovan, 65 Mo. App. 521; Hale on Bailments, p. 30, *et seq.* It will be seen that the latter cases have not followed what appears to have been the holding in Rey v. Toney, 24 Mo. 600.

III. But in the case at hand, the defendants have, in their second count, made specific charges of negligence. They, in effect, allege that the missing steer was lost either through

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the negligent omission of plaintiff to maintain a good fence around the pasture, or was negligently lost while moving the cattle from one to the other pasture. It must be held then that defendants have assumed the burden of establishing one or the other of those alleged acts of negligence. They have based their right of recovery on these facts (the one or the other) and they must prove their case as alleged, or fail in the result.

As to the testimony bearing on these alleged acts of negligence, it must be conceded that there is not a shadow of proof that the steer was lost in driving from one pasture to another; and the undisputed evidence, or rather conceded facts, clearly show that the animal never escaped through the fence or gates. While this is shown by evidence that might be called negative, it is yet conclusive. It is admitted by all parties that there were just one hundred and fifty cattle (neither more nor less) in the pasture from which defendants claim that their steer may have escaped. It is conceded, too, that one of these was killed by lightning. This would leave one hundred and forty-nine. The testimony shows—without dispute and beyond a shadow of doubt—that the different owners took out respectively, twenty, fifty, forty and thirty-nine head, that is, in all one hundred and forty-nine cattle. None, therefore escaped, all were accounted for. So that it is mathematically certain that no animal was lost and defendants' missing steer can be accounted for on one of two theories—that is, it was either killed by lightning or was taken through mistake by one of the other cattle owners. If the loss occurred in either way plaintiff is not responsible. For it is well settled that the agister is not an insurer of stock entrusted to his care, is only liable for loss occurring by his negligence, and plaintiff can not be held for the taking by one of the other cattle owners, because defendants were present and consented to the division. And it seems, too, that in dividing the cattle a dispute arose between defendants and another party as to the

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ownership of one of the cattle, but defendants yielded to the claim of the other.

IV. A close examination of the testimony has convinced us that the jury could not consistently find any other verdict than the one rendered; the undisputed evidence shows that defendants are not entitled to recover on either counterclaim. No error "materially affecting the merits of the action" was committed—Fitzgerald v. Barker, 96 Mo. 661—and the judgment must, therefore, be affirmed. The other judges concurring, it is so ordered.

THE CITY OF SEDALIA, ex rel., Appellants, v. M. B. COLEMAN, Respondent.

Kansas City Court of Appeals, February 5, 1900.

1. **Special Tax Bills:** STREET INTERSECTION: LIABILITY FOR IMPROVEMENT. In cities of the third class by section 108 of the Laws of 1893, lots in each block, when the street in front thereof is paved, are each liable to assessment for such improvement for two quarters of street intersections, one at each corner of the block; and this, though said improvements are made at different times under different ordinances, and the first improvement was ordered under the general statutes governing cities of the third class, since the act of 1893 has not changed such former law but stated the details more fully.

2. **Municipal Corporations:** CITIES OF THIRD CLASS: EXHAUSTION OF TAXING POWER. Where a city has assessed and collected for the intersection at one corner of the block, it has not thereby exhausted its power to assess and collect for the improvement at the intersection of the other corner of the block.

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Appeal from the Pettis Circuit Court.—*Hon. G. F. Longan*, Judge.

REVERSED AND REMANDED.

Montgomery & Montgomery for appellant.

(1) The fact that the defendant had paid the costs of improving the street in front of his property and his proportion of the cross street east of him does not relieve him from paying his share of the costs of improving the intersection of the street lying west of his property. The legislature had the power to amend the charter and change the methods of imposing the benefits of the work. Farrar v. St. Louis, 80 Mo. 393; Express Co. v. St. Joseph, 66 Mo. 680.

Barnett & Barnett for respondent.

(1) The finding of the court was right. There can be no lien imposed for street paving on property not abutting on the line of the improvement, that is, not abutting on the portion of the street improved. Such property is not within the taxing district. It is outside of the territorial limits of the improvement provided for, and hence not subject to taxation. Mosewood Avenues Campbell's App., 159 Pa. St. 20; Witman v. Reading, 169 Pa. St. 375; Park Avenue Sewers, App. of Parker et al., 169 Pa. St. 433; 54 Street, Pittsburgh App., 165 Pa. St. 8; Brunot v. Borough, 4 Pa., Superior Court, 608; Colwyn Borough v. Tarbottom, 9 Pa., Superior Court, 414; Ryan v. Sumner, 17 Wash. 228; Cincinnati v. Batsche, 40 N. E. (Ohio), 21. (2) Respondent's property having previously been assessed and he having paid his assessment for paving Seventh street from the east line of Grand avenue east to Ohio street, which assessment included his *pro rata* share of all the intersections from Grand avenue to Ohio street (R. S.

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1889, sec. 1495), can not now be again assessed in another and different taxing district. He can not be assessed twice, as his lot has already borne its burden of paving the part of Seventh street on which it abuts. Campbell's App., 159 Pa. St. 36; 54 Street, Pittsburg App. 165, Pa. St. 8; Brunot v. Borough, 4 Pa. Superior Court, 608; Colwyn Borough v. Tarbottom, 9 Pa. Superior Court, 414.

ELLISON, J.—This is an action on a special tax bill issued in part payment for paving a street in the city of Sedalia, a city of the third class and governed by the laws of 1893, page 65. The judgment in the trial court was for defendant.

Defendant is the owner of a lot at the northeast corner of Seventh street and Grand avenue in said city which has a frontage of fifty-five feet on the former street. In 1892 (under provisions of the General Statutes, section 1495) Seventh street was paved from a point beginning on the east line of Grand avenue, and running thence east several blocks. Defendant paid his special tax for this improvement according to his frontage on the street, including the proportionate part of his lot for the first intersection on the east side of the block in which his lot lies.

Afterwards (under an amended statute) the city passed the ordinance for the paving in question; that is, beginning at the said east line of Grand avenue and running thence west on Seventh street for several blocks. The work was done under this ordinance and defendant's property was assessed with a proportionate part of the cost of the intersection of the two streets. The proceeding was had under subdivision, sixth, of section 108, of the law 1893, superseding section 1495, aforesaid, and reading as follows:

"The cost of paving or macadamizing the squares and areas as formed by the crossing or meeting of streets and other highways or parts thereof, or connections therewith,

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shall be levied as a special assessment and paid for as follows: Such area shall be divided into parts or portions by lines drawn lengthwise along the middle of each of said streets or highways so intersecting or meeting, and the cost of said parts or portions shall be levied, as a special assessment against the block or square contiguous to each, and pro-rated against the lots or pieces of ground in such block or square on the street improved."

The proper construction of this law is involved in the case. The defendant contends that no property can be charged with any part of the paving except that which abuts or fronts on the improvement, that is, on the part of the street which is improved; and as his property does not front or abut on this paving, it can not be charged. Plaintiff contends that while the defendant's property does not front on the part of the street improved, it does front on the street, and lies in the block contiguous to the improvement. In other words, the parties agree that the defendant's property fronts on Seventh street but not on that part of it that was improved under this ordinance, as the paving, under this ordinance, began at the southwest corner of defendant's lot and ran thence west. The parties also agree that the immediate front of defendant's lot was paved under the first ordinance which authorized a pavement from Grand avenue east, and that under that ordinance defendant paid for his frontage and for his portion of the first intersection east of him. For a better

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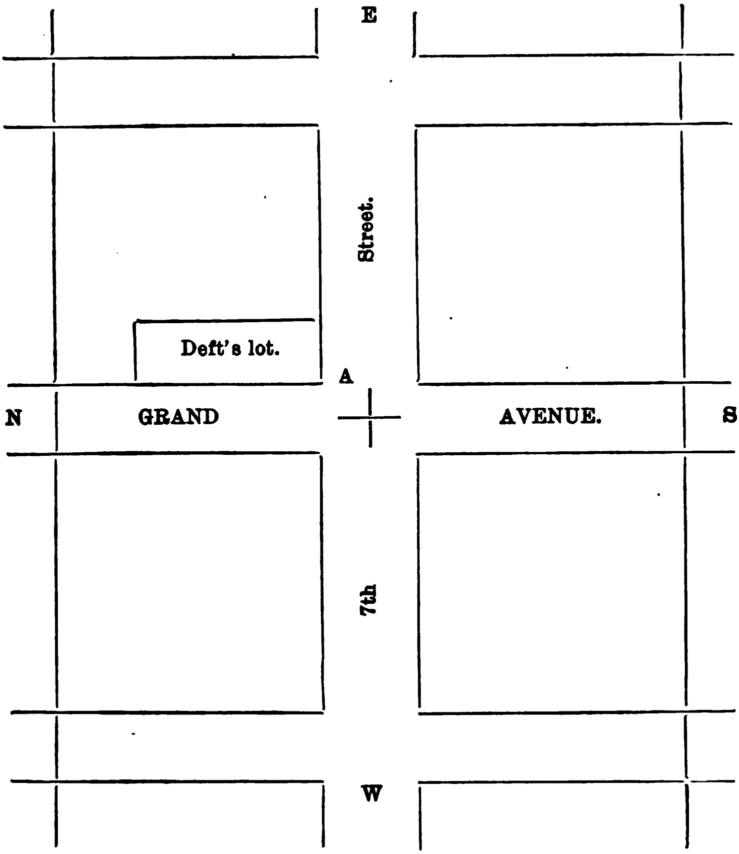
understanding of the question, reference is made to the following plat:



The northeast quarter of the intersection of the streets, marked "A," and on which defendant's lot corners, is the portion of the paving which it is sought to charge against defendant's lot and the other lots in that block fronting with defendant's on Seventh street.

We can see no reason why it should not be done. The statute above set out means that the lots fronting on the

street which is improved and which lie in the block which is contiguous to the respective quarters of the intersections, shall pay for such intersections. So that it results that such lots in each block are subject to assessment for two quarters of intersections, one at each corner of the block, since that half or portion of the block lies contiguous to two points where streets cross, or intersect. Defendant's lot and the others in the same block fronting on Seventh street have therefore heretofore only borne one-half the burden which the law has put upon them. And there is no wrong in forcing them to bear the remaining half; unless we are ready to say that for the reason that an intersection of a street does not lie immediately in front of a lot that the cost of its improvement could not be put upon the lot. We can not say that, since the contrary has been the understanding and the practice in this state for many years, and it has received the sanction of the supreme court at least twice. Powell v. St. Joseph, 31 Mo. 347; Farrar v. St. Louis, 80 Mo. 392. In this respect we are not in harmony with some rulings of the supreme court of Pennsylvania, cited in defendant's brief.

In saying that defendant's lot has, by the first paving only borne one-half the burden which the law has put upon it, we are not unmindful of the provisions of section 1495, Revised Statutes 1889, under which that work was done. For by that law the cost of paving streets and intersections could only be assessed against the lots in each block separately; that is, each block paid for the intersections on which it cornered. The present law, though more in detail, in this respect has not changed the former law. Defendant's property at the first paving has not (or should not have) paid for more than its proportion of the one intersection which was at the northwest corner of the block.

2. It is furthermore objected that after once exercising the taxing power against defendant's lot, the power was exhausted by the municipality and could not again be resorted to.

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But if we are right in what we have already ruled the full taxing power was not exhausted on the first improvement. The first improvement only required of defendant's lot its portion of the cost of one quarter intersection, whereas it is liable for two. Besides, it appears that this state is not in line with Pennsylvania on such question. McCormack v. Patchin, 53 Mo. 33.

The foregoing consideration leads to a reversal of the judgment and remanding the cause. It is so ordered. All concur.

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102 1853

JAMES HANSBERGER, Respondent, v. SEDALIA ELECTRIC RAILWAY, LIGHT & POWER COMPANY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Pleading:** EVIDENCE: INSTRUCTION: VARIANCE: SURPRISE. A petition alleged that upon signal a street car stopped and plaintiff took hold of the handrail and stepped, etc., to get on when the motorman negligently and carelessly let off the brake and caused the car with great force and speed to lurch forward, etc. The evidence showed the car was moving slowly when the plaintiff attempted to enter. The instruction permitted a recovery if the motorman undertook to stop the car to receive plaintiff and at the time of accident the car was nearly stopped or moving slowly. *Held*: There was no variance since the allegation of the petition was not unproved in its entirety as the allegation that the car stopped was matter of inducement and the gravamen of the complaint was the negligence in letting off the brake, etc.; but if there be a variance it can not be availed of since appellant filed no affidavit of surprise. Chitty v. Railway, 148 Mo. 64, distinguished.

2. **Negligence:** CAREFUL EMPLOYEES: INSTRUCTION: HARMLESS ERROR. An instruction telling the jury that it was defendant's duty to have careful employees in charge of its cars is not improper in this case and, if unnecessary, it was harmless.

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3. **Street Railways**: DUTY TO STOP CAR: INSTRUCTION: HARMLESS ERROR. An instruction that it is the duty of a street car when signalled to stop and receive the passenger and not move until he is in a place of safety, is held in this case a harmless abstraction.

4. **Trial Practice**: CREDIBILITY OF WITNESSES: WEIGHT OF EVIDENCE: INSTRUCTION: FALSUS IN UNO. An instruction relating to the credibility of witnesses and the weight of evidence is fatally defective when it submits to the jury only the credibility of the witnesses appearing before the jury and not those testifying by deposition, and likewise submits the importance of the testimony as well as its weight and allows them to form their belief from all they had seen and heard at the trial, and confines the jury in applying the rule of falsity to the facts mentioned in the instructions and not permitting them to apply the rule to all the facts in the case whether mentioned in the instructions or not.

5. **Personal Injury**: MEASURE OF DAMAGES: INSTRUCTION: PETITION. Under the petition in this cause an instruction on the measure of damages allowing recovery for mental and physical pain suffered and to be suffered, for permanent injury and for all damages present and future, the necessary result of the injury, was proper.

6. **Street Railways**: ENTERING MOVING CAR: CONTRIBUTORY NEGLIGENCE: JURY QUESTION. To attempt to get on a car in rapid motion is negligence *per se;* but whether to undertake to get on a car barely moving or not moving at a greater rate than from one to three miles an hour is negligence, is a mixed question of law and fact and should be submitted to the jury under proper instructions.

7. ———: EVIDENCE: PLEADING: CONSTRUCTION OF STEP. In an action to recover for personal injury, evidence as to the fault of construction of the step to the street car is admissible where the petition counts on negligence in suddenly starting the car.

Appeal from the Pettis Circuit Court.—*Hon. George F. Longan,* Judge.

REVERSED AND REMANDED.

Montgomery & Montgomery for appellant.

(1) Plaintiff's instructions numbered one, four and five, submitted to the jury a different cause of action from the one

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pleaded. Meriwether v. Cable Co., 45 Mo. App. 528; Chitty v. Railway, 148 Mo. 64; Mason v. Railroad, 75 Mo. App. 1; Bartley v. Railway, 148 Mo. 139. (2) Plaintiff's first instruction imposes a duty on the defendant, which it is not charged with the violation of, viz.: The duty of having careful employees in charge of the cars. (3) Plaintiff's third instruction is ambiguous; construing it in harmony with the petition, it is consistent with plaintiff's first, fourth and fifth instructions. Construing it in harmony with these instructions, it is not the law. (4) Plaintiff's first, fourth and fifth instructions do not properly submit any cause of action to the jury. Worthington v. Railway, 72 Mo. App. 166; Meriwether v. Cable Co., 45 Mo. App. 534. (5) Plaintiff's sixth instruction allowed the jury to include in the damages, compensation for future pain. This was erroneous, because there is no evidence, and the petition does not allege that plaintiff will suffer any pain in the future from the injury. (6) The court erred in permitting plaintiff to introduce evidence showing that the car step was very short, very high and rounded out, so as to be dangerous. Bartley v. Railway, 148 Mo. 139.

John Cashman for respondent.

(1) Defendant's first objection is that plaintiff's instructions numbered one, four and five, submitted to the jury a different cause of action from the one pleaded. These instructions are based on the evidence, and are authorized by the pleadings and the proof. The following authorities dispose of defendant's first objection. Ridenhour v. Railway, 102 Mo. 270; Mellor v. Railway, 105 Mo. 455; Gannon v. Gas Co., 145 Mo. 502; Prewitt v. Railway, 134 Mo. 615; Leslie v. Railway, 88 Mo. 50; Olmstead v. Smith, 87 Mo. 602; Wise v. Railway, 85 Mo. 178; Bank v. Taylor, 69 Mo. App. 99; Pancoast v. Gas Co., 60 Mo. App. 57; Horse Co. v. Bennett & Son, 52 Mo. App. 333; Lalor v. Bryne, 51 Mo. App. 578; Haughey, L. & U. Co. v. Joyce, 41 Mo. App. 564; Corri-

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gan & Waters v. Brady, 38 Mo. App. 649, 659; Taylor v. Penquite, 35 Mo. App. 389, 402; Hoyt v. Quinn, 20 Mo. App. 72; Sackewitz v. Biscuit Co., 78 Mo. App. 144; Toppass v. Syrup Co., 74 App. 402. (2) The variance complained of could have been cured by amendment at the trial upon objection to the evidence authorizing the giving of the instructions above criticised. The defendant, however, chose to remain silent; filed no affidavit setting up surprise, for which he is now precluded under the construction given to sections 2096, 2097, 2098, 2100, 2101, 2238, 2239, 2113, 2114 and 2117, Revised Statutes 1889, by the supreme court in Mellor v. Railway, 105 Mo. 455. (3) The most that defendant can complain of is that there was a variance between the pleadings and the proof. Where the proof when offered is not objected to the instructions may follow the proof, and it is too late to make the objection for the first time in this court. Mellor v. Railway, 105 Mo. 455, 471, and cases cited; Olmstead v. Smith, 87 Mo. 602; R. S. 1889, sec. 2097. (4) No variance is considered fatal under our code, unless it amounts to an entire failure of proof. Casey v. Donovan, 65 Mo. App. 521; Horse Co. v. Bennett & Son, 52 Mo. App. 333; Lalor v. Byrne, 51 Mo. App. 578; Corrigan & Waters v. Brady, 38 Mo. App. 649, 659; Bank v. Leyser, 116 Mo. 51; Boggess v. Railway, 118 Mo. 328. (5) It is not negligence *per se* to attempt to board a street car while moving. Schepers v. Railway, 126 Mo. 665; Fulks v. Railway, 111 Mo. 335; Weber v. Railway, 100 Mo. 194. (6) It is not necessary to plead future pain and suffering. When the injury is permanent, a general allegation of damages will be a sufficient basis for allowing compensation for these elements. They are the necessary and natural results of the act complained of, and need not be specially pleaded. Gerdes v. Iron & Foundry Co., 124 Mo. 347, 361; Barth v. Railway, 142 Mo. 535; Coontz v. Railway, 115 Mo. 669; Mellor v. Railway, 105 Mo. 455; Kupferschmid v. Railway, 70 Mo.

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App. 438. (7) The inquiry as to the information of the car step, in the cross-examination of the motorman, Brown, was first, within the bounds of proper cross-examination, and second, it was proper as presenting to the jury, as nearly as possible, the correct formation of the approach to the car, and third, it was responsive to the answer of the witness when he said plaintiff slipped when attempting to board the car. (8) The defendant's fourth instruction was properly refused. It arbitrarily declared the act of attempting to mount a moving car to be such contributory negligence as, in itself, without qualification, would preclude a recovery entirely. This is not the law. Schepers v. Railway, 126 Mo. 665; Fulks v. Railway, 111 Mo. 335; Weber v. Railway, 100 Mo. 194.

SMITH, P. J.—Action to recover damages for personal injuries. The petition of the plaintiff alleged, that on September 15, 1897, plaintiff approached the track of defendant at the intersection of Fifth and Ohio streets, in Sedalia, and signaled the car of the defendant, which was approaching from the north; that in response to said signal the motorman in charge of said car, brought the car to a stop; that thereupon plaintiff believing that said car had stopped for him to board the same, took hold of the handrail and then set one foot on the step to board said car, but before plaintiff could or had time to step upon said car, the said motorman, negligently and carelessly instantly let off the brake, turned on the power, and thereby caused said car instantly and with great force and speed to lurch forward and violently strike plaintiff upon the body, whereby he was thrown down and under said car, etc.

There was a trial resulting in judgment for plaintiff, and from which defendant has appealed.

I. The defendant objects that the court erred in giving the plaintiff's instructions numbered one and five. Number one told the jury that if it believed from the evidence that the "plaintiff signaled to the motorman in charge of said car

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to stop the same and the motorman saw said signal and undertook to stop said car for the purpose of receiving said plaintiff as a passenger thereon and that at the time said car was nearly stopped, or moving slowly that plaintiff could have boarded or entered the same with safety by the exercise of reasonable and ordinary care, and that he did attempt to board said car and in doing so he exercised such care as a reasonably careful and prudent person would have exercised under the same circumstances, and that while he was so attempting to board said car, and when he had taken hold of the handrail and had one foot on the step, the motorman in charge of said car carelessly and negligently threw off the brake and turned on the electrical current, and thereby caused the car to lurch, or start suddenly forward, and that by reason of such sudden starting forward of said car the plaintiff was thrown down and off the car and run over and injured, without any negligence on his part directly contributing thereto, then this verdict will be for the plaintiff."

And the fifth told the jury that, although they believed that plaintiff undertook to get on defendant's car while in motion, yet if it was moving slowly and at such a rate of speed that a reasonably prudent person in the exercise of ordinary care and prudence could have boarded said car in safety and that the plaintiff in attempting to board said car exercised such care and prudence, as a reasonably prudent person would have done at the time under the same circumstances, then the fact that the car was still in motion when the plaintiff undertook to board it does not relieve the defendant from liability if the defendant was at the time guilty of negligence in the management and operation of said car, and such negligence was the direct cause of the plaintiff's injuries.

The plaintiff deposed that: "I waited for the car to come up and gave him the signal with my right hand and the car came up and practically stopped, and I took hold of the front part of the car, the handle or hand rail on the front part

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of the car. I got one of my feet on the step when the motorman turned on the power and it throwed me face forward with my right arm, or my left arm rather, going across the track and the piece under there hit me in the side. The only thing I remember was the wheel going over my arm and after that I did not know. At the time I went to get on the car it had not entirely stopped. It was just moving a little when I reached out my hand and took hold of the handrail on the platform. I did not take hold with my left hand and * * * did not have time to do so before the motorman turned on the current and knocked me down." Three other witnesses testified for plaintiff to the effect that when plaintiff took hold of the handle bar and placed one foot on the step of the platform of the car it had not come to a dead stop, but was moving just a little bit "nearly stopped but had not stopped." "Had slowed up but was moving."

Some of the witnesses for defendant testified that at the time the plaintiff attempted to board the car it was running at a speed of about three miles an hour; whilst another testified that its speed was about a mile an hour.

It is thus seen that there is a variance between the allegations of the petition and the instruction. The petition alleges that the defendant had stopped its car to allow plaintiff to enter the same, and that while he was proceeding to do so its motorman negligently turned on the full current of electricity, and thereby caused said car to instantly and with great force and speed lurch forward, whereby plaintiff was thrown down and under said car, etc.

The plaintiff's two instructions told the jury that if it found that the defendant's motorman saw the plaintiff's signal and undertook to stop the car for the purpose of receiving plaintiff as a passenger thereon, and that at the time the car was nearly stopped or moving slowly that plaintiff could have entered the same with safety by the exercise of reasonable and ordinary care, and that in the exercise of such care while at-

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tempting to get on board of the car and when he had taken hold of the handrail and had one foot on the step, the motorman in charge of the car negligently turned on the electrical current and thereby caused the car to start suddenly forward, by reason whereof plaintiff was thrown down, run over, etc.

The evidence adduced by the plaintiff tended to support the theory of his instructions. The concurrent testimony of all the witnesses was that the car had not fully stopped at the time the plaintiff attempted to get on board of it. No objection was taken to this evidence, either by demurrer or otherwise.

The defendant contends that the liability for an injury caused by suddenly starting a car which is standing still is established by proof of certain facts, but that if the injury is caused by suddenly accelerating the speed of a moving car, the liability is established by proof of other and different facts, and that it therefore inevitably follows that the cause of action alleged in the petition is not that upon which plaintiff was permitted to recover. But suppose this contention be conceded to the defendant: is he entitled to a reversal of the judgment for that reason? It is incontrovertable that the instructions to which objection is made by defendant are sufficiently supported by the evidence. Nor is there any complaint that, if the petition alleged the facts hypothesized by them, they would not, in that case, correctly express the law. The allegation of the cause of action to which the proof was directed was not unproved in its entire scope and meaning, and there was, therefore, not an entire failure of the evidence. The allegation in the petition that the defendant "stopped" the car for the purpose of allowing the plaintiff to get on the same is no more than the allegation of a matter of inducement, and no negligence is alleged in doing that act. The negligence alleged consists in letting off the brake and turning on the full current of electricity while plaintiff was in the act of getting on the car. So that it may be well doubted whether there

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was any substantial variance between the facts alleged and those proved.

But if there be such a variance, it can not be made available to defendant as a ground of reversal, since it did not take advantage of the supposed variance in the manner pointed out by the statute. No affidavit was filed stating that it had been misled to its prejudice in maintaining its defense upon the merits. R. S. 1889, sec. 2096; Ridenhour v. Railway, 102 Mo. 270; Mellor v. Railway, 105 Mo. 455; Turner v. Railway, 51 Mo. 501; Clements v. Maloney, 55 Mo. 352; Ely v. Porter, 58 Mo. 158; Bank v. Wills, 79 App. 275; Olmstead v. Smith, 87 Mo. 607; Clydesdale v. Bennett, 52 Mo. App. 333.

The defendant cites and greatly relies on the recent case of Chitty v. Railway, 148 Mo. 64. In that case the petition charged that the injury was occasioned by a collision. The plaintiff was given two instructions, one of which authorized a verdict for plaintiff, if the jury found the facts so alleged in the petition; and the other authorized a verdict if it was found that the injury was caused by the plaintiff's leg being caught between the door and the jamb thereof, while he was attempting to escape from the caboose when he had reasonable cause to apprehend a collision and the danger thereof was then imminent and impending, etc. "The negligence averred was a collision and the proof was that the injury was received while attempting to escape from the caboose to avoid injury from an apprehended and imminent and impending collision which he believed was about to occur. The proof of one such cause of the injury necessarily disproves the existence of the other, and, in this case, the plaintiff elected to stand upon the first cause stated, and his evidence supports that theory, yet after telling the jury in the first instruction to find for the plaintiff if they believed the injury was received from this cause, the court told them, in the second instruction, to find for the plaintiff if they found he was not injured from the specific acts of negligence charged but was injured in

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another and different manner caused by negligence the existence of which necessarily disproves the existence of the specific negligence alleged and relied on in the petition."

It is thus made quite plain that the case here is quite unlike that, from which we have just quoted. In that case the court by its instructions for plaintiff not only authorized the jury to find for plaintiff, if it found the facts alleged in the petition, but also authorized it to find for plaintiff if it found a different unalleged state of facts, the proof of the existence of which would disprove those alleged in the petition. It therefore must be manifest that the ruling there made can not be invoked as an authority applicable here. Without specially noticing the other cases cited by the defendant, in connection with that of Chitty v. Railway, it is proper to say that it will be found, on a close examination of each of them, that they have no direct bearing on the point under consideration.

The defendant further complains that the plaintiff's said first instruction is open to the objection that it declared that it was the duty of defendant to have in charge of its cars careful employees to manage the same. This complaint is, we think, without merit. This instruction declared what it is conceded was the proper measure of duty imposed by law on the defendant while engaged in operating its railway. The jury was thereby further told that if it found the facts existed which were therein specified that then the defendant had neglected to fill the measure of duty required of it by law and was therefore liable. But if we are wrong in this it is not perceived that the defendant was in any way harmed by the words of the instruction, to which it objects. It is our conclusion therefore that the court did not err in giving plaintiff's said instructions number one and five. And this, for like reasons, is true as to his fourth.

The defendant objects further that the plaintiff's third instruction, which declared that, if "at the time the plaintiff

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undertook to board the defendant's car, the motorman in charge of said car saw plaintiff and knew that he wanted to get on said car as a passenger, then it was the duty of the defendant to stop the car, and not to move it until plaintiff was in a place of safety on said car." The jury was not required by any instruction to predicate liability on the violation of the duty declared by this instruction. It was little, if anything, more than a harmless abstraction.

The defendant further objects to the plaintiff's sixth instruction, which told the jury that they were the sole judges of the credibility of the several witnesses that had appeared before them, and the weight and importance of their respective statements of testimony, and if they believed from all they had seen and heard at the trial of this case that any witnesses had willfully sworn falsely as to any of the facts mentioned in the instructions, then they were at liberty to disregard entirely the testimony of such witness, was erroneous in expression. It told the jury that it was the sole judge of the credibility of the several witnesses who had appeared before it. Plaintiff, it seems, did not appear before it, but his deposition was read by his attorney.

The jury may have very well concluded that since the plaintiff did not personally appear before it that his credibility was not open to question by it. It is disclosed by the evidence that there was a conflict between the testimony of the plaintiff and some of the other witnesses in respect to matters which were material for the jury to consider in determining the issues, and therefore it may be that the direction of this instruction greatly misled the jury to the prejudice of the defendant.

Again, the jury were further told in the same instruction that it was the sole judge of the weight and importance of the statements and testimony of the witnesses. The weight of the testimony is primarily at least a question for the jury to determine, but the materiality is always a question for the

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court. The term "importance" as used, standing in the relation which it does to the word "weight," is not interchangeable with the latter. To tell the jury that it is the sole judge of the importance of the testimony of any witness was to tell it, by an equivalent term, that it was the judge of the materiality of the testimony. It might have concluded that under this direction it was authorized to reject certain testimony, not because untruthful but because it was immaterial. It may have, under this direction, rejected much testimony because in its judgment unimportant or immaterial, and thereby caused an improper shifting of the weight of the evidence, which, otherwise, would not have taken place.

It is objected that the phrase "from all they had seen and heard at the trial of the case" was too broad. Most certainly a jury is not warranted in wholly disregarding the testimony of a witness unless there is that in his appearance, or demeanor while testifying, or some inherent defect in his testimony, or inconsistency with that of other witnesses, or physical facts, which lead it to the conclusion that the witness is untruthful. The instruction in this regard is fairly subject to the defendant's criticism.

The defendant further objects that these words of said instruction, viz.: "to any facts mentioned in the instructions" are too restrictive. If any witness willfully swore falsely to any material fact, whether mentioned in the instructions or not, that fact was sufficient to authorize the jury to entirely disregard the testimony of such witness. It often occurs that the constitutive facts of a case are established by inference from other facts which are proved. The constitutive facts are referred to in the instructions but those from which all or part of them are inferred are not therein referred to. Now, a witness may have willfully sworn falsely in relation to one or more of the latter facts, and yet, under the instruction, the jury so believing would not be authorized to disregard the testimony of such witness. In the present case the plaintiff

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deposed to a number of material facts which were not referred to in the instructions. This testimony was at variance with that of other witnesses relating to the same facts, and yet the jury might have very well concluded that, even though the plaintiff had willfully sworn falsely in giving such testimony that it was not authorized to disregard plaintiff's entire testimony because the facts to which it related were not mentioned in the instructions. This, we think, sufficiently demonstrates the impropriety of the action of the court in restricting the authority of the jury, as was done by this instruction. We can not but think that its enunciation was highly prejudicial to the defendant and that it should not have been given.

The plaintiff's instruction relating to the measure of damages is not open to the objection which the defendant suggests. The petition claimed that on account of the negligent acts of defendant, and on account of injury sustained, as well as the permanent nature thereof, and on account of the physical and mental pain and anguish endured, and on account of moneys expended for surgical attendance and medicines, that plaintiff was damaged in the sum of five thousand dollars. This instruction told the jury that if they found for plaintiff to assess such damages as it believed from the evidence would compensate him for his injuries, including (1), mental and physical pain suffered; and (2), that he will suffer; and (3), permanent injury sustained; and (4), all damages present and future believed to be the necessary results of the injury, etc. In view of the ruling made in Gordes v. Iron & Foundry Co., 124 Mo. 347, this instruction was sufficient under the allegations of the petition.

The defendant further complains of the action of the court in refusing its fourth instruction, which was to the effect that, if at the time and place mentioned in the plaintiff's petition the plaintiff signaled the motorman operating the defendant's car to stop, and while said motorman was in the

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act of slowing the speed of said car plaintiff without waiting for the car to stop, attempted to get on and was in consequence thrown down and injured, he can not recover in this action. This instruction was, as we think, an incorrect expression of the law. It can not be said, as a matter of law, that a person of the experience that plaintiff was shown to have had, in attempting to get on a street railway car moving at no greater rate of speed than from one to three miles an hour, though propelled by electricity, would be guilty of such contributory negligence as would preclude a recovery. The car which plaintiff attempted to get on was, according to the testimony of some of the witnesses, barely moving, or going at a speed of not more than a mile an hour. To attempt to get on or off a car while in rapid motion would be an act of gross negligence, but it would not be negligence *per se* for one to undertake to get on a car that has slowed up until it is barely moving or not moving at a geater rate of speed than from one to three miles an hour. The question of contributory negligence in cases like this is one of mixed law and fact and should be determined by the jury under the guide of proper instructions in the light of all the facts and circumstances disclosed by the evidence. Fulks v. Railway, 111 Mo. 335; Schepers v. Railway, 126 Mo. 665; Doss v. Railway, 59 Mo. 27; Swigert v. Railway, 75 Mo. 475; Leslie v. Railway, 88 Mo. 51; Clotworthy v. Railway, 80 Mo. 221; Straus v. Railway, 75 Mo. 185; Weber v. Railway, 100 Mo. 194.

We are inclined to the opinion that the court should not have admitted the evidence relating to the construction, etc. of the step of the car, as there was no issue under which the same was admissible. The petition does not count on negligence of that kind.

We shall accordingly reverse the judgment and remand the cause. All concur.

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ELIZABETH STRAHORN, Appellant, v. JOHN STRAHORN, Respondent.

Kansas City Court of Appeals, February 5, 1900.

1. **Appellate Practice:** DIVORCE: FINDING OF TRIAL COURT. In divorce and equity suits it is the duty of the appellate court to weigh and consider all the evidence and direct such change in the judgment as to it seems proper; and while it may defer in some measure to the finding of the trial court it is not bound thereby.

2. **Divorce:** IGNORANCE: CRUEL TREATMENT: EVIDENCE. The evidence in this case is reviewed and found to authorize the wife to a divorce with alimony.

Appeal from the Cedar Circuit Court.—*Hon. D. P. Stratton*, Judge.

REVERSED AND REMANDED (*with directions.*)

Cole & Burnett for appellant.

(1) The evidence in case at bar shows that plaintiff was subjected by her husband to a long catalogue of indignities which were well calculated to render her condition intolerable. Such treatment entitles the wife to a divorce. Tripp v. Tripp, 78 Mo. App. 413. (2) Divorce is a legal right and where the facts which entitle a plaintiff to it exist, as they do in this case, the courts have no discretion to deny it. Deschodt v. Deschodt, 59 Mo. App. 102, 106; Morris v. Morris, 60 Mo. App. 87. (3) The court of appeals is not bound by the finding of the lower court but will render its own conclusions upon the proof contained in the record. Griesedieck v. Griesedieck, 56 Mo. App. 94; Owen v. Owen, 48 Mo. App. 208-211; Hoffman v. Hoffman, 43 Mo. 547-551; R. S. 1889, sec. 2304.

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GILL, J.—This is a suit for divorce, wherein the wife, as plaintiff, charges the defendant husband, first, with such cruel and barbarous treatment as to endanger her life, and, second, with offering her such indignities as to render her condition as his wife intolerable. In his answer and cross-bill the defendant—after admitting the marriage, the separation in November, 1897, etc.—charges indignities on the part of his wife and prays for divorce. At the trial below the court refused a divorce for both the parties, dismissed the petition and cross-bill, and plaintiff appealed.

We seldom feel it our duty to reverse the finding of a trial judge on the facts of a case, though in divorce and equity suits it is our duty to weigh and consider all the evidence, and direct such a change or modification of the judgment as to us may seem proper. And while in so doing we are authorized to defer somewhat to the finding of the lower court, we are not yet bound by its judgment.

A careful reading of this record has convinced us that the plaintiff wife has a good and meritorious claim for divorce. In our opinion, the evidence establishes both of the statutory grounds set up in her petition—she has been so barbarously treated as to endanger her life, and subjected to such indignities that it would be cruel to force her to remain any longer the wife of the defendant.

At the date of their separation in November, 1897, this couple had been married about thirty-two years and the wife had given birth to ten children, two of which were then minors. The husband is a coal miner, and this has been his occupation for nearly the entire period of their married life. Shortly however before the separation a poor little farm had been secured in Cedar county and the family resided there. The husband however spent much of his time away from home, working in coal mines, while the wife with her children were left on the farm. They were poor and had lived at different times in several states of the Union.

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The preponderance of the evidence shows that during the last several years the husband habitually conducted himself in a neglectful, cruel and barbarous manner towards his wife. He was so continually abusive towards her that it might be well called his normal condition. He not only quarrelled, but cursed and used the vilest and most abusive language towards her. He would frequently upbraid her in presence of the children and denounce her as "a damned liar," "a damned old bitch" and as "a damned old troup"—the latter intended, according to the understanding of the family, as meaning a woman of bad character, a prostitute. On several occasions, too, the defendant struck his wife, and even, according to his own admissions, threatened to beat her with a chair, and would have done so if not prevented. At one time Mrs. Strahorn was badly injured in a runaway and thrown in a ditch. The husband was at the time away from home but he did not go to his wife or pay any attention to her—never saw her till three months thereafter.

The climax of this course of maltreatment came on November 18, 1897, when the defendant went into the little family dwelling and insisted on using the milk bucket to slop the hogs. The wife objecting, he turned on her in a great rage, knocked her down and beat her, so that her head and body were sorely bruised. At that time he threatened to get his gun and kill the plaintiff. She fled to the house of a neighbor and never returned to him. This and other outrageous conduct of this man make a strong case for divorce. It was such as to render the plaintiff's condition as his wife intolerable within the meaning of the statute; and the assault and threats of November 18, when the plaintiff was driven from her home, constituted such cruel and barbarous treatment as to endanger the life of the wife.

It is true that on the witness stand the defendant denied most of these charges, but he admits sufficient of them to justify the charges and to warrant the conclusion that he was

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most brutal in the treatment of his wife. It is a significant fact, too, that the defendant's testimony is confronted and opposed not only by that of the wife but of every member of the family. The children at home fully corroborate the mother and unite in saying that the father was continually abusive and cruel towards the mother. Besides, the testimony of the defendant is of itself inconsistent, contradictory and unsupported in so far as it differs from that of the plaintiff's witnesses. We think his testimony is so unreliable that no defense or counterchange against the wife ought to be considered when resting alone on such evidence.

As to the question of alimony, we think but little should be expected. We will reverse the judgment and remand the cause with directions to the circuit court to enter a decree of divorce for the plaintiff with an allowance of $300 alimony in gross, she, the plaintiff, to have the care and custody of the two minor children. All concur.

THE STATE OF MISSOURI, Respondent, v. JOHN G. FERGUSON.

Kansas City Court of Appeals, February 5, 1900.

1. **Criminal Law:** REMOVING CORNER STONE: WILLFULLY EQUALS KNOWINGLY. In the statute relating to removing of corner stones willfully means knowingly, that is, with wrongful intent, not merely intentionally.

Appeal from the Barton Circuit Court.—*Hon. D. P. Stratton*, Judge.

Reversed and remanded.

Cole & Burnett for appellant.

(1) If the word "willful" is used in this statute to convey its usual signification then its signification is "with

a bad motive or purpose." State ex inf. v. Equitable Loan and Investment Co., 142 Mo. 338. The word "willful" must be restricted to such acts as are done with an unlawful intent, and implies tort, wrong; it implies legal malice; that the act was done with evil intent, or without reasonable grounds to believe the act was lawful. State v. Grassle, 74 Mo. App. 313; Commonwealth v. Kneeland, 20 Pick. 220; State v. Preston, 34 Wis. 682; Stat. of Mass. 1865, chap. 230, sec. 3; Hanson v. South Scituate, 115 Mass. 336; Fuller v. Railroad, 31 Iowa, 204; 29 Am. and Eng. Ency. of Law [1 Ed.], p. 114, note 2; Bishop on Statutory Crimes, sec. 231; 1 Bishop's New Criminal Law, secs. 425, 427, 428; R. S. 1889, sec. 3597. Under above section the act must have been done willfully. State v. Pitts, 58 Mo. 556, 558; State v. Newkirk, 49 Mo. 84.

Edwin L. Moore for respondent.

(1) That "willfully" in criminal statutes has any other than the well established meaning in Missouri, except possibly in cases in which "corruption" is an ingredient, is not shown by the numerous authorities cited by appellant; and in the Grassle case in the 74 Mo. App., if it decides otherwise, the St. Louis Court of Appeals evidently overlooked or failed to appreciate the distinction between cases in which that element appears and cases in which it is no ingredient, as pointed out by this court in the Ragsdale and Latshaw cases, *supra*. The definition of "willfully" in the case at bar is the definition frequently approved by the supreme court in far more serious cases, and by this court in a case of mere trespass on a highway like this. State v. Bradley, 31 Mo. App. 308-320; State v. Avery, 113 Mo. 475-495-502; State v. Duestrow, 137 Mo. 44-67.

ELLISON, J.—Defendant was indicted and convicted for removing a corner stone marking the boundary of tracts of

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land. The prosecution is based on section 3597, Revised Statutes 1889, reading as follows:

"Every person who shall willfully or maliciously, either: First, remove any monument of stone or any other durable material, created for the purpose of designating the corner or any other point in the boundary of any lot or tract of land, or of the state, or any legal subdivision thereof; or, second, deface or alter the marks upon any tree, post or other monument, made for the purpose of designating any point in such boundary; or, third, cut down or remove any tree upon which any such marks shall be made for such purpose, with intent to destroy such marks, shall, upon conviction, be adjudged guilty of a misdemeanor."

The indictment charges that defendant, "on, etc., did then and there willfully and unlawfully remove a certain monument of stone, created and set in the earth for the purpose of designating the corner of a certain tract of land, etc."

The principal point against the judgment relates to the meaning to be given to the word, "willful," as used in the statute. The state contends that it means that the act was done intentionally and not accidentally. The defendant, on the other hand, says the word as used in the statute, means to imply some wrongful motive or knowledge. The trial court held with the state and in so doing we think it committed error.

It is quite true that in misdemeanors a wrongful intent is not necessarily essential. For instance, a sale of intoxicating liquor to a minor is an offense, regardless of the belief of the seller that he was of age. So of many cases affecting the revenue, especially that of the Federal government. The legislature, on account of the facility of evading the law, cuts off all opportunity to do so by broadly declaring the act itself to be the offense.

But here, the offense consists not alone in moving a corner stone, but in willfully moving it. That is, in moving it

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knowing it was a corner stone. A man might move a stone in the most innocent way, and under circumstances where no one would have thought of it being a corner stone, yet, if it afterwards turns out to have been, in fact, a corner stone, he surely ought not to be charged with a violation of this statute, notwithstanding he intentionally moved the stone. The act lacks the statutory element of willfulness.

There are many cases where the supreme court of this and other states have held in grave felony cases, that, willfully merely meant, intentionally. But those are cases which involved other terms of definition to make out the offense—terms which necessarily showed wrongful motive. So while in such cases, murder for instance, willfully would mean intentionally, yet the further words defining the offense demonstrates that it must be a wrongful intention. It would not be allowable, of course, in a case of murder to instruct that willfully could mean an innocent act done intentionally.

The statute in question by using the word willfully meant more than the mere voluntary act; it meant to imply a wrongful act. Merely doing an act intentionally, that is, not accidentally, will not fill the definition of a misdemeanor which requires that it shall be done willfully. The voluntary act should be with a bad or an unlawful purpose. State v. Preston, 34 Wis. 682; Commonwealth v. Kneeland, 20 Pick. 220; Hanson v. South Scitnate, 115 Mass. 336; Fuller v. Railway, 31 Iowa, 204; Felton v. United States, 96 U. S. 699; 1 Bishop's Crim. Law, sec. 428.

As before stated, there are acts which are made misdemeanors without qualification and where the act alone makes the offense. Such is the game law, as enacted in section 3902, Revised Statutes 1889. It is to such class that the general language used in Haggerty v. Ice & Storage Co., 143 Mo. 238, is addressed. In such class the act itself is unconditionally and absolutely made an offense. In the class to which this case belongs, the offense is made to depend upon

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something besides the act; something which characterizes the act.

The judgment is reversed and the cause remanded. All concur.

JAMES M. DYE, Respondent, v. GEORGE E. BOWLING, et al., Appellants.

Kansas City Court of Appeals, February 5, 1900.

1. **Partnership**: DISSOLUTION: CONTINUING TRUST: EQUITY. An agreement of dissolution of a firm of lawyers provided that each should continue to prosecute the business he had brought to the firm, collect the fees and account to the other members therefor. *Held*, that this created a relation of agency, or, rather, an implied continuing trust, and that equity will compel an accounting at the suit of one of the parties.

2. ——: ——: ——: ——: LIMITATIONS. Where a partner is in ignorance of the amount collected by his former co-partner and the delay in the settlement of the partnership accounts has been acquiesced in and there has been no refusal to settle, the statute of limitations is not a bar to an action in equity for an accounting.

3. ——: ——: ——: ——: LACHES. The doctrine of laches does not apply in this case since that doctrine presupposes not only delay but such knowledge of facts on which the claim for relief is based as renders the delay culpable.

4. **Judgment**: REMITTITUR. The decrees examined and found erroneous in amount and remittitur ordered.

Appeal from the Barton Circuit court.—*Hon. D. P. Stratton*, Judge.

AFFIRMED SI.

Thurman & Wray for appellants.

(1) There are no allegations in the petition proven that entitle plaintiff to equitable relief. All the testimony con-

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ceded the partnership was dissolved more than ten years before the filing of the petition. On plaintiff's own testimony a settlement and accounting was had about the time of the dissolution of the partnership. There being but one item, suit at law was proper remedy. Equity will not lie. Bambrick v. Simms, 132 Mo. 48; Whetstone v. Shaw, 70 Mo. 577; Buckner v. Ries, 34 Mo. 357; Feurt v. Brown, 23 Mo. App. 332; Hamilton v. Hamilton, 18 Pa. St. 20; Adam's Equity, 241; 1 Story's Equity [12 Ed.], sec. 662, also note 1; Callaway v. Woodward, 28 Mo. App. 320; Thias v. Siener, 103 Mo. 314; Gotcher v. Haefner, 107 Mo. 270. (2) This claim as set forth in plaintiff's petition would have been barred by the statute of limitation but for the fact alleged in the petition that a partnership existed and plaintiff was entitled to have it dissolved. R. S. 1889, sec. 6775; Johnson v. Smith, Adm'r, 27 Mo. 591; State to use v. Willi, 46 Mo. 236; Perkins v. Cartmel, 4 Har. 270; Bispham v. Price, 15 How. 178; Barber v. Barber, 18 Ves. 286. (3) A court of equity will not extend its remedial arm to those who have been guilty of laches in asserting their claims, especially "when time has impaired the recollection of the transaction and obscured the memory of its details." Lunsford v. Lead Co., 54 Mo. 429; Stevenson v. Saline County et al., 65 Mo. 425; Burdett v. May, 100 Mo. 13; Rogers v. Brown et al., 61 Mo. 187; Goodson, Adm'r, v. Goodson, 140 Mo. 217; Johnston v. Toulim, 52 Am. Dec. 220.

Tucker & Moore for respondent.

(1) This action is properly one in equity. Equitable jurisdiction includes all actions of pecuniary recovery for the settlement of all claims which may exist between the partners themselves. Bender v. Markle, 37 Mo. App. 234, 241; 1 Pomeroy's Equity Jurisprudence, sec. 112, p. 96, and sec. 186, p. 176. (2) A suit in equity may be maintained in

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all cases where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account. Leeper v. Taylor, 111 Mo. 312-321. (3) The supreme court says: "We know no principle which declares that the statute of limitations begins to run against an action to adjust and settle partnership accounts from the time of its dissolution." Massey v. Tingle, 29 Mo. 438; Bender v. Markle, 37 Mo. App. 234, 242, 243, 244; Coudrey v. Gilliam, 60 Mo. 86-92; Hargadine v. Gibbons, 114 Mo. 561-565; 2 Lindley on Partnership [Am. Ed.], by Rapalje, star p. 573, side p. 958, n. 6. (4) And technical and continuing trusts are not cognizable at law, but fall within the peculiar and exclusive jurisdiction of courts of equity, and are not affected by the statute of limitations. Shortridge v. Harding, 34 Mo. App. 354-359; Burdett v. May, 100 Mo. 13-18; Johnson v. Smith, 27 Mo. 591-593; Dillon v. Bates, 39 Mo. 292-301; Rubey v. Barnett, 12 Mo. 3-8; Wood, Limitations of Actions, sec. 214; R. S. 1889, sec. 6775; 2 Story's Equity, sec. 1521a; Hunter v. Hunter, 50 Mo. 445-452; Thomas v. Mathews, 51 Mo. 107; Ricords v. Watkins, 56 Mo. 553-555; Bispham's Equity, sec. 203 et seq.; 2 Clement & Bates Partnership, secs. 944, 947; Chouteau v. Barlow, 110 U. S. 238. (5) As to the charge of laches, appellant's own authority shows it only properly applies when the party to be charged therewith has "full knowledge of all the facts on which he relies." This plaintiff did not have. Goodson v. Goodson, 140 Mo. 206; Butler v. Lawson, 72 Mo. 227-249; Moreman v. Talbott, 55 Mo. 392-397. (6) The delay of Bowling to pay plaintiff his share of this fee, which it was his trust duty to do, might with equal propriety be called laches, if not something stronger, and estop him from asserting laches on plaintiff's part. This charge comes with ill grace from these defendants. Cannon v. Sanford, 20 Mo. App. 590; Bender v. Markle, *supra*, 243; 2 Greenleaf on Ev. [14 Ed.], sec. 448; Smith v. Newby, 13 Mo. 159;

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Pike v. Martindale, 91 Mo. 268-285; Chouteau v. Barlow, 110 U. S. 238.

SMITH, P. J.—This is a suit in equity. The petition prayed for a dissolution of a partnership and for an accounting, etc. There was a trial by the court resulting in a decree for plaintiff, and the defendants appealed.

It is disclosed by the testimony that in November, 1886, the plaintiff and defendants, who were lawyers, entered into an unlimited partnership for the practice of their profession. The net income of the partnership business was to be equally divided between the three partners. In July, 1887, by mutual consent the partnership was dissolved.

It was a part of the dissolution agreement that each member of the dissolved partnership should give the required attention to such business of the partnership as he had brought to it and remaining undisposed of at the time of the dissolution, collect the fees therefor and charge himself therewith on the partnership books of account, and that the fees so received should be divided equally between such partners. It appears from the undisputed evidence that at the time of the dissolution there was pending in one of the courts a partition suit, referred to by the witnesses as the "Buckwalter case," which was disposed of by defendant Bowling some months after the dissolution and in which there was a fee of $400 paid him.

The plaintiff collected something like fifteen or twenty dollars on account of the old business after the dissolution, but beyond that and the fee collected by defendant Bowling nothing seems to have been collected by either of the partners. It appears that the first knowledge that the plaintiff had of the collection of the Buckwalter fee by Bowling was obtained from defendant Robinson in 1891, but the amount of such fee was not learned until disclosed by the evidence of Bowling at the trial. While it is conceded by defendants that

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Bowling collected the Buckwalter fee, they do not concede that the plaintiff is entitled to have them account for one-third thereof to him. They say in their testimony that if the plaintiff was entitled to one-third of such fee that it was paid to him. This is hardly candid. It is neither an admission that plaintiff was entitled to one-third of such fee nor an assertion that a payment thereof had been made by them, or either of them, to plaintiff. As it appears that this was the only fee collected after the dissolution in which plaintiff had an interest, it is singular that if the defendants paid plaintiff his part of it that they did not recollect the time, when or place where made, or some circumstance attending it. A consideration of all the testimony has convinced us that the defendants, nor either of them, have accounted to plaintiff for the one-third of the Buckwalter fee which was collected by Bowling as they ought to have done.

The question now is, can the defendants be required to come into an accounting with the plaintiff in a court of equity. The relation created between plaintiff and defendants, under the agreement of dissolution already referred to, was that of agency, or rather, that of an implied continuing trust. The agreement contemplated a subsequent accounting and settlement between plaintiff and defendants in respect to the matters to which it related. There never was any such accounting and settlement. The plaintiff did not know, nor had he any means of knowing what fees or the amounts thereof had been collected by defendants under the agreement of dissolution. The books of account of the partnership in which, under the agreement, the collections made by each partner were to be entered, were lost or destroyed while in possession of defendants, so that plaintiff could get no information from that source. The plaintiff having discovered that the Buckwalter case had been disposed of on the record of the court where pending, inquired of one of the defendants what fee had been paid in the case? And he at one time

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answered that he did not know and at another that he thought it was fifty dollars. The plaintiff testified that he learned from some other source—what, he did not testify—that the Buckwalter fee was five hundred dollars.

Defendant Bowling testified that not long before the institution of this suit, in a heated and, perhaps, angry discussion between plaintiff and himself (Bowling), the plaintiff told him that if he would pay him his share of the Buckwalter fee that he could pay his rent, and thereupon he (Bowling) remarked that he (plaintiff) ought "to have sued a long time ago." Under these conditions it seems clear to us that there was a duty resting on the defendants to render an account, and that a suit in equity can be maintained to compel the performance of that duty. Denver v. Roane, 99 U. S. 355; Leeper v. Taylor, 111 Mo. 312; Bender v. Markle, 37 Mo. App. 234; Pomeroy's Equity Jurisprudence, secs. 112, 186.

After the dissolution agreement was entered into there was no settlement of the accounts of the partnership thereunder, and no balance ascertained, and therefore no action at law could be maintained by plaintiff against the defendants for any unascertained balance claimed by him.

Nor do we think the application of the five years' statute of limitation can be invoked to defeat the plaintiff's right to an accounting. The statute did not run against the action for an accounting from the time of the making of the dissolution agreement. That agreement clothed each partner with authority thereafter to collect the unsettled accounts of the partnership, and imposed upon them the implied duty to subsequently account for and settle with each other in respect thereto. Where the facts are all ascertained by the court it becomes its province to declare whether the action for the accounting is barred. Massey v. Tingle, 29 Mo. 437.

The liabilities of the partnership had all been discharged at the time of the dissolution. The partnership was ended

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as to everything except as to the debts due and to become due to it. The agency of the partners to collect the outstandings according to the dissolution agreement, was continuing. The relation between the partners though a continuing trust was not an express technical trust, but, rather, as already stated, a continuing implied trust. As long as there were partnership debts to be collected, the statute did not begin to run as to the account between the partnership and any of its members; and the agency or trusteeship of the several partners would continue so as to prevent the statute from running until such agency or trusteeship was renounced on the one side or not recognized on the other. The delay in the settlement of the partnership accounts seems to have been consented to, or, at least, acquiesced in by all the partners. There was no refusal to settle until shortly before this action was commenced. Under such facts and circumstances the statute of limitations was no bar. Bender v. Markle, *ante*; Coudrey v. Gilliam, 60 Mo. 86; Hammond v. Hammond, 20 Ga. 556.

Nor can the contention of the defendants that the delay of the plaintiff in instituting proceedings for relief constitute laches chargeable to the latter, be upheld, for the reason that laches presupposes not only delay in the institution of the proceedings for relief but such knowledge of facts on which the claim for relief is based as renders the delay culpable. Butler v. Lawson, 72 Mo. 227; Goodson v. Goodson, 140 Mo. 206; Moreman v. Talbott, 55 Mo. 392. If the fact that the Buckwalter fee had been collected by defendant Bowling was not concealed from the plaintiff the amount thereof was. It is quite certain that the plaintiff did not acquire full knowledge of the facts on which he relied for relief until a short time before this action was brought..

The decree was for $186.15. This the defendants insist was not authorized by the testimony. The amount collected by defendants was $400—one-third of this would be

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$133.33. The amount decreed was manifestly in excess of that authorized by the testimony, unless the court allowed interest. If interest was chargeable, it could not be allowed plaintiff for the reason that it was not prayed for by the petition. Hill on Trustees, p. 819; Weymouth v. Boyes, 1 Vesey Jun., 426; Brune v. Pendleton, 12 Vesey, 391; Girvin v. Refrigerator Co., 66 Mo. App. 315; State v. Gold Spring Co., 72 Mo. App. 573.

It results from what has just been said that the decree is erroneous as to the amount found for plaintiff. If the plaintiff will, within ten days hence, file a remittitur as to the difference between $133.33 and $186.15, the decree will be affirmed; otherwise, reversed and cause remanded. All concur.

J. S. WACHTEL, Respondent, v. E. A. EWING, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Fraudulent Conveyances**: CHANGE OF POSESSION: WHISKY IN BOND. A sale of whisky in bond by the owner on an order for it which is made known to the officer in the immediate possession, is a sufficient change of possession, especially when followed by an actual turning over by the officer to the vendee.

2. ———: ATTEMPT TO HINDER: PRACTICE. Where the question of fraud with intent to hinder creditors is submitted to the jury upon instructions asked by each party, the verdict is conclusive upon the appellate court.

3. ———: EXISTING ATTACHMENT: KNOWLEDGE OF VENDEE. The fact that an attachment writ was out against the vendee's property generally, will not affect the validity of the purchase unless the vendee knows thereof, especially where such writ had been returned at the time of purchase.

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4. ———: ABANDONED ATTACHMENT LEVY. The fact that a levy has been attempted under an attachment writ and abandoned and the writ returned will not vitiate a sale otherwise valid.

Appeal from the Vernon Circuit Court.—*Hon. H. C. Timmonds*, Judge.

Affirmed.

A. J. King and *M. T. January* for appellant.

(1) Where the evidence, together with the admissions of a party to the record, admit of but one reasonable conclusion, it is the duty of the trial court to peremptorily instruct the jury. And the action of the trial court in so refusing will be reviewed on appeal. Janis v. Roentgen et al., 52 Mo. App. 114; Bank v. Gardner 57 Mo. App. 268. (2) Instruction number 2 is erroneous because it requires the jury to find "knowledge" on the part of Wachtel of the fraud of Wiseman. Notice of facts sufficient to put him on inquiry satisfies the requirements of the law. Abbe v. Justus, 60 Mo. App. 300. (3) The title to property in the hands of a bailee may be transferred so as to satisfy the statute on fraudulent conveyances by notice to the bailee. There being no notice to the bailee in this case, instruction number 1 is erroneous. Halderman v. Stillington, 63 Mo. App. 212. (4) A vendee can not be an innocent purchaser if before he has paid the purchase price he has knowledge that the property has been, or is about to be attached at the suit of a creditor of his vendor, based upon an allegation of a fraudulent or attempted fraudulent disposition of such property. Young v. Kellar, 94 Mo. 581; Dougherty v. Cooper, 77 Mo. 528; Shelley v. Boothe, 73 Mo. 74.

Scott & Bowker and *J. B. Journey* for respondent.

(1) The appellate court will not reverse the verdict of a jury unless there is no evidence to support it. James v. Ins.

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Co., 148 Mo. 1; Davis v. Railroad, 46 Mo. App. 180. (2) When property is in the hands of a bailee, notice by the vendee to him is all that is necessary to transfer the title and possession. Worley ex rel. v. Standley, 22 Mo. App. 546; Halderman v. Stillington, 63 Mo. App. 212. (3) Possession by vendee at any time before levy is good against attaching creditors. McIntosh v. Smiley, 107 Mo. 377. (4) The statute of frauds does not apply in regard to change of possession where the property is in the possession of the bailee. Worley ex rel. v. Standley, *supra*. (5) The word owner as used in the revenue law means the party legally entitled to it. Conrad v. Fisher, 37 Mo. App. 403. (6) All the cases hold that regard must be had to the character of the property, its location, and the circumstances surrounding it, in ascertaining whether the vendee has taken possession within a reasonable time.

ELLISON, J.—This is an action of replevin for thirteen barrels of whiskey in which plaintiff prevailed in the trial court. The defendant is the sheriff of Vernon county and had the property in possession by reason of a seizure under a writ of attachment issued from the circuit court of that county in the case of Bryan against Wiseman, wherein the latter was charged to be indebted to the former. Plaintiff claims to have purchased the property of Wiseman prior to the levy of the attachment.

The following are the facts substantially as the evidence for plaintiff tends to establish them; the verdict being for plaintiff we accept them as true. The whiskey was the property of Wiseman who distilled it, but was in the government bonded warehouse, the revenue tax not being paid thereon. While thus in the possession of the government for the purpose aforesaid, plaintiff purchased it of Wiseman, receiving from him an order on the store-keeper and gauger for the same; also statement of number of barrels and contents made

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out on the gauger's report. Plaintiff then sent a draft for the tax, amounting to $646.69 to the collector of the revenue and asked to have the barrels "stamped out" and turned over to him. In a few days the proper government officers (deputy collector and store-keeper) appeared and began to "stamp out" the whiskey. While they were thus engaged, plaintiff came into their presence and presented his order from Wiseman. One of the officers took it, saying it was all right. When the officers finished stamping, one of them turned to plaintiff and said: "here is your whiskey." Just at that moment the deputy sheriff announced that "I attach this whiskey," and took it away with teams which he had in waiting.

The foregoing made out a complete sale and change of possession before the officer's attachment was levied or offered to be levied. A sale of the whiskey in bond by the owner by an order for it which is made known to the officer in immediate possession was sufficient change of possession of itself. Conrad v. Fisher, 37 Mo. App. 352; Halderman v. Stillington, 63 Mo. App. 212. But here we have, in addition, an actual turning over by the officer to the vendee. The court therefore properly refused defendant's instruction B.

2. A question of fraud with intent to hinder and delay creditors was made as to Wiseman and a knowledge of such intent on the part of plaintiff at the time of his purchase. This issue was submitted to the jury, the instructions in that respect for each party were given by the court as asked. We must therefore accept the verdict of the jury as conclusive.

There was an instruction offered by defendant and refused which peremptorily directed the jury to find for defendant. This was, presumably, on the ground, additional to what we have already noticed, that there was an attachment writ issued at the suit of Bryan and directed against Wiseman's personal property generally. But the evidence for

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plaintiff tends to prove that he did not know of such writ being outstanding when he purchased, and it is conceded that the writ was returned. The writ under which the present attachment was levied was an alias issued after the sale to plaintiff in the manner aforesaid.

3. There was evidence tending to show that an attachment of this property had been attempted, prior to the sale to plaintiff, by the sheriff going to the warehouse and posting up a notice on the outside to that effect. But, passing by any question of the effect of such a proceeding as a levy and seizure, the levy was evidently abandoned and the writ returned. The levy under which this claim is made is under an alias writ issued just before the seizure made thereunder, as has just been stated.

We discover no ground justifying an interference of the judgment and it is affirmed. All concur.

J. W. WOOD, Respondent, v. FRANK E. KELLY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Appellate Practice:** ABSTRACT: INSTRUCTION WITHOUT EVIDENCE. The appellate court does not consider an objection to an instruction based on the ground that it is unauthorized by the evidence unless all the evidence is set out in the abstract, but will presume that there was sufficient evidence to warrant the instruction.

2. **Damages:** INSTRUCTION: DUTY OF DEFENDANT. If plaintiff's instruction relating to the measure of damages is general and indefinite, the defendant should ask an instruction limiting and particularizing the elements, otherwise he can not object to plaintiff's instruction.

3. **Trial Practice:** INSTRUCTION: EVIDENCE. It is not error to refuse an instruction when there is no evidence to support it.

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Appeal from the Vernon Circuit Court.—*Hon. J. M. Hull*, Judge.

AFFIRMED.

J. B. Journey for appellant.

(1) The defendants' theory of this case is that if their hogs escaped from their hog pasture and trespassed on plaintiff's premises it must have been by reason of the bad condition of that portion of this agreed partition fence between plaintiff's potato patch and defendants' hog pasture. If defendants' hogs did trespass as claimed by plaintiff they must necessarily have gone through this fence somewhere. It is also admitted that the stock law was in force in this county at the time of this alleged trespass. Hopkins v. Ott, 57 Mo. App. 292; Field v. Bogie, 72 Mo. App. 186. (2) The court erred in failing to instruct the jury as to the proper measure of damages. See plaintiff's instructions number 2. Matney v. Grain Co., 19 Mo. App. 107-112; Wilburn v. Railway, 36 Mo. App. 215, and cases cited thereunder; Kick v. Doerste, 45 Mo. App. 140, and cases cited thereunder; Jacquin v. Cable Co., 57 Mo. App. 335; Schaub v. Railway, 106 Mo. 74; Goss v. Railway, 50 Mo. App. 614; Buttles v. Railway, 43 Mo. App. 280; Morrison v. Yancey, 23 Mo. App. 670.

Scott & Bowker for respondent.

(1) Where all the evidence is not set out in appellant's abstract or bill of exceptions, the appellate court will not consider errors complained of in the giving or refusing of instructions. Carpenter v. McDavitt, 53 Mo. App. 393; Aultman & Co. v. Smith, 52 Mo. App. 351; Deering v. Collins, 38 Mo. App. 80; Sage v. Tucker, 51 Mo. App. 336; Lindsey v. Dixon, 52 Mo. App. 291; Ewart v. Tootle, 50 Mo. App. 322; Meriwether v. Howe, 48 Mo. App. 148; Christopher v. White,

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42 Mo. App. 428. (2) If plaintiff's instruction on the measure of damages is general, it devolves upon the defendant to ask an instruction limiting it and particularizing the elements, if he wishes to do so. Overruling Schaub v. Railroad, 106 Mo. 93; and Goss v. Railroad, 50 Mo. App. 623, cited by appellant. Haymaker et al. v. Adams et al., 61 Mo. App. 581; Rose v. McCook, 70 Mo. App. 183.

SMITH, P. J.—The plaintiff's growing crop of potatoes was "rooted up" and destroyed by the defendants' trespassing hogs; and on account of which the former sued the latter for damages before a justice of the peace. The case was by appeal removed to the circuit court, where plaintiff had judgment and defendants appealed here.

The defendants now question the propriety of the action of the trial court in giving the jury a peremptory instruction to find for the plaintiff nominal damages on the ground that there was no evidence to warrant the giving of the same. The plaintiff insists that the evidence preserved by the bill of exceptions is ample to justify the giving of said instruction, and that such evidence has not been presented by the defendants' abstract. We would not heed the plaintiff's insistance, since if he was dissatisfied with the defendants' abstract he could have filed a counter-abstract, and thus presented the whole evidence, were it not for the fact that the defendants confess that their abstract does not present all the evidence. Defendants in their supplementary brief say there were twelve witnesses for plaintiff and fourteen for defendants, whose testimony covers eighty-seven closely typewritten pages of the bill of exceptions, and that in their opinion the testimony of none of these witnesses, except that of the four set forth in their abstract, bear on any question presented to us for decision.

But the plaintiff is of the contrary opinion, and such being the case we are unable to determine the issue thus made

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unless the entire evidence was presented to us by the abstract. Unless the parties had stipulated, or in some way conceded, that the omitted evidence had no bearing in the case, it should have been abstracted. It was the defendants' duty to present a complete abstract of the evidence, and the mere fact that they deemed that a part thereof had no bearing on any question arising on the appeal will not suffice as an excuse for their dereliction. If the plaintiff did not agree to the omission and did not file a counter-abstract, then the defendants must suffer the consequence of their neglect. We have repeatedly ruled that where the abstract does not present all the evidence we will not consider an objection to an instruction based on the ground that it is unauthorized by the evidence. Christopher v. White, 42 Mo. App. 428; Meriwether v. Howe, 48 Mo. App. 148; Goodson v. Railway, 23 Mo. App. 77; Lindsey v. Dixon, 52 Mo. App. 291. And in such case we will presume that the evidence before the court was sufficient to justify the giving of the instruction.

The defendants further object that the second instruction given by the court for the plaintiff which related to the measure of damages was erroneous. This instruction, in effect, told the jury that, if it found for the plaintiff to assess his "damages at such sum as they believed from the evidence he had sustained, not to exceed the amount claimed in his statement." The objection is that it is too general and does not specify the elements of damages which the jury was authorized to consider. The plaintiff was entitled to recover the full value of his growing crop of potatoes as if fully matured and gathered, and in arriving at such value at the time of the destruction, the cost of the additional cultivation, if any was needed, the expense of gathering and fitting for the market should be considered by the jury. Buttles v. Railway, 43 Mo. App. 280.

If the defendants had desired that the attention of the jury be called by the court to the rule just indicated, he should

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have asked a supplementary instruction therein embodying the same, but having failed to do so, the defendants' objection is not available here as a ground of reversal: Browning v. Railway, 124 Mo. 55; Haymaker v. Adams, 61 Mo. App. 581; Rose v. McCook, 70 Mo. App. 183.

The court refused the defendants' first instruction which told the jury that if the defendants' hogs escaped from their hog pasture through the plaintiff's portion of the partition fence between their hog pasture and plaintiff's premises, and trespassed upon plaintiff's premises in consequence of the bad condition of that part of the said partition fence, the defendants were not liable. Although the refusal of this instruction is assigned as error, we have been unable to discover any evidence tending to prove that the defendants' hogs escaped through that part of the partition fence which it was plaintiff's duty to keep in repair. There is, however, some slight evidence tending to show that the defendants' hogs escaped from their barn lot through the partition fence between it and the plaintiff's premises. The plaintiff had not obligated himself to keep any part of said partition fence in repair except that part between the defendants' hog pasture and the plaintiff's premises. The defendants' instruction was therefore properly refused.

The judgment must accordingly be affirmed. All concur.

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MONARCH RUBBER COMPANY, Respondent, v. J. W. BUNN, Defendant; G. W. HUTCHISON, Interpleader, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Attachment:** JURISDICTION: WRIT TO NEIGHBORING COUNTIES. Where the defendant in an attachment suit is not a resident of the county in which suit is brought the court has no jurisdiction to send its writ to a neighboring county unless property is found and attached in the county where suit is instituted.
2. **Bill of Exceptions:** EVIDENCE: SHERIFF'S RETURN. A sheriff's return can only get into the record in another case by being offered in evidence and being preserved in the bill of exceptions.
3. ———: INTERPLEA: JURISDICTION: PRESUMPTION. An interplea in an attachment case is in the nature of an independent action and its records are to be evidenced and treated separately from the main case and the circuit court will be presumed to have jurisdiction of goods seized in neighboring county unless the record shows to the contrary.
4. **Possession:** TRESPASSER: INSTRUCTION: JURISDICTION. An instruction that bare possession of personal property will warrant a verdict against a sheriff's levy under an attachment writ, is improper where the court issuing the writ has jurisdiction.

Appeal from the Vernon Circuit Court.—*Hon. H. C. Timmonds*, Judge.

AFFIRMED.

M. T. January and *J. B. Johnson* for appellant.

(1) Suits by attachment must be brought in the county where the property of defendant is found. R. S. 1889, sec. 2010. (2) When property of the defendant has been attached in the county where suit is brought, other writs may then be sent to other counties; but not until then. R. S. 1889, sec. 541 (3) Defendant Bunn, being a nonresident

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of Vernon county, the circuit court of Vernon county acquired no jurisdiction over him, by service on him in Cedar county, nor over the property attached in Cedar county by the sheriff of that county under a writ issued to him by the clerk of the Vernon circuit court, unless property of the defendant was found in Vernon county and taken by the sheriff of that county under a writ issued to him. Newton v. Strang, 48 Mo. App. 538. (4) The return of the sheriff of Vernon county on his writ of attachment shows a seizure of property, but does not allege it to be Bunn's property or that he had any interest therein. This is not sufficient to confer jurisdiction to issue a writ to Cedar county to attach property located there. Anderson v. Scott, 2 Mo. 15; Newton v. Strang, 48 Mo. App. 538; Repine v. McPherson, 2 Kan. 340. (5) Possession alone is sufficient to prevail over the lien of an attachment under a void writ. Grocery Co. v. Shackelford, 56 Mo. App. 642; Friar v. McGuire, 70 Mo. App. 581. (6) The court therefore erred in refusing instruction number 2.

Chas. E. Gilbert and *Scott & Bowker* for respondent.

(1) To constitute a valid levy under a writ of attachment, under the present statute, all that is necessary is that the officer take the property into his custody and possession under and by virtue of the writ. R. S. 1889, sec. 541. (2) The rule that in replevin the officer must show all the prerequisites for the issuance of the writ, does not apply to a case where the pretended vendees' title is fraudulent. In such case it is only necessary to show a writ in proper form from the proper source. Clarke v. Laird, 60 Mo. App. 289. (3) The records and filings in the attachment suit proper, constitute no part of the record in the interplea suit, and the only way that such filings can be gotten in the record in the case of the interplea is to introduce them in testimony and incorporate them in a bill of exceptions. Crow v. Stevens, 44 Mo. App. 137; Brennan v. O'Driscoll, 33 Mo. 372; Wolff v. Vette, 17

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Mo. App. 36; Giett v. McGannon, 74 Mo. App. 209. (4) In an action of interplea the only question in issue is the ownership of the attached property. Beck v. Wisely, 63 Mo. App. 239; Brownwell v. Colbern, 139 Mo. 142; Rubber Co. v. Bunn, 78 Mo. App. 55. (5) Nothing will be presumed to be outside the jurisdiction of a court of general jurisdiction except it be made to affirmatively appear. Hamer v. Cook, 118 Mo. 476; McClannahan v. West, 100 Mo. 309.

GILL, J.—The Monarch Rubber Company brought an attachment suit in the Vernon circuit court against defendant Bunn—writs being issued to Vernon county and to Cedar county where said Bunn resided. Under the writ to Cedar county the sheriff levied on certain goods therein as the property of Bunn. Subsequently, Hutchison filed his interplea claiming the goods attached in Cedar county. On the trial of the issues formed by plaintiff's answer to the interplea, it is conceded that the evidence tended to prove that Hutchison's alleged purchase of the goods from Bunn was merely colorable, and was made with the intent to hinder, delay and defraud Bunn's creditors, among whom was the Monarch Rubber Company.

There was a verdict and judgment for the plaintiff, and against the interpleader, and the latter appealed.

1. The sole question on this appeal is one of jurisdiction. Counsel for interpleader claim that there was some evidence that at the time the goods in controversy were levied on, said interpleader was in the actual possession thereof. It is also claimed that under the writ of attachment issued to Vernon county no property of the defendant Bunn was there seized, and hence the writ to Cedar county was without authority and void. On this assumption the interpleader asked, but the trial judge refused the following instruction: "If the jury believe from the evidence that interpleader Hutchison was in possession of the stock of goods in controversy at the

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time the attachment was levied by the sheriff of Cedar county, the verdict should be for the interpleader."

The theory of this instruction is, that bare possession of personal property is sufficient to resist the claim of one clothed with no right whatever.

Interpleader's counsel are clearly correct in the contention that the circuit court of Vernon county had no authority to issue a writ of attachment to Cedar county, unless property of the defendant was found and attached in said Vernon county. The defendant resided in Cedar county, was served there and never appeared in any way to the action. The only way then that the Vernon county court could acquire jurisdiction to issue a writ of attachment to Cedar county was by attaching property of the defendant found in Vernon county. R. S. 1889, sections 541 and 2010.

2. In this case however we are not legally informed as to whether or not the property of the defendant Bunn was attached under the writ issued to Vernon county. We assert this in face of the fact that interpleader's counsel, in their statement of the case, attempt to copy what is termed the sheriff's return on the Vernon county writ. It does not appear that said writ and return were ever introduced in evidence in the trial of the interplea; the bill of exceptions contains no such matter, and it therefore comprises no part of the record here for review.

3. It is well settled that an interplea is in the nature of an independent action and its records are to be evidenced and treated separately from the main case. Wolff v. Vette, 17 Mo. App. 36; Crow H. & Co. v. Stevens, 44 Mo. App. 137. In the absence then of a showing to the contrary, we must assume that property of the defendant Bunn was seized and attached under the Vernon county writ. The court there being one of general jurisdiction every presumption in its favor will be indulged. Gates v. Tusten, 89 Mo. 13.

4. The jurisdiction then of the circuit court of Vernon

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county being conceded, its writ of attachment to Cedar county must be treated as valid, and the sheriff then was not a mere trespasser while levying on property found to belong to the defendant Bunn.

It results then that the judgment of the lower court must be affirmed. All concur.

J. H. CUNNINGHAM, Respondent, v. UNION CASUALTY & SURETY COMPANY OF ST. LOUIS, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Accident Insurance:** CO-ORDINATE INDEMNITIES: RELEASE: BAR TO SECOND ACTION: CONSIDERATION. An accident policy provided alternate indemnities for loss of limb or sight or continued disability. Within thirty days after the accident the insured sent in a claim for continued disability and signed a voucher containing a release of the insurer and a discharge of the policy. Within ninety days as stipulated in the policy he gave notice of loss of entire sight resulting from same accident. *Held:* The voucher was not a bar to the second claim and would not prevent a recovery as the release was broader than the consideration.

2. ———: SPLITTING DEMANDS: EXCEPTION TO THE RULE: SCIENTER. An entire claim can not be divided and made the subject of several suits but the rule presupposes knowledge of the constituent elements of the cause of the action and does not apply where the plaintiff is in unavoidable ignorance of the full extent of the injuries done.

3. **Trial Practice:** ACTION: BAR. Where several claims payable at different times arise out of the same transaction, separate actions may be brought as each liability accrues but all that are due must be included in one action or those not included will be barred.

4. **Insurance:** CO-ORDINATE INDEMNITIES: DISCHARGE OF POLICY. Held, *arguendo* that the payment for loss of either an eye or a limb would terminate the policy and render it nugatory as to all other indemnities, but such consequence does not attend payment for disability.

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5. ———: CONSTRUCTION OF POLICY. Where the policy is capable of two meanings that meaning must be applied which is more favorable to the assured, even though it was intended otherwise by the insurer.

Appeal from the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

Galen & A. E. Spencer for appellant.

(1) The delivery by plaintiff of his indemnity claim and release, and the payment made him therefor, by defendant, were in compromise and settlement of all the former's claims for injuries growing out of the accident to him, and bar this action. Hinkle v. Railroad, 31 Minn. 434; 18 N. W. Rep. 275; Retzer v. Packing Co., 58 Mo. App. 264; Homuth v. Railroad, 129 Mo. 629; Updegrave v. Railroad, 7 L. R. A. (Pa.) 213. (2) Plaintiff's claim against defendant on account of the accident was liquidated. Coal Co. v. St. Louis, 145 Mo. 651. (3) All plaintiff's injuries resulted from the same accident, and gave him one cause of action against defendant; he accepted payment and gave his release, and this release is a bar to the present action. He could not split his cause of action. Mateer v. Railway, 105 Mo. 320-355; Hinkle v. Railroad, 31 Minn. 434; 18 N. W. Rep. 275; Funk v. Funk, 35 Mo. App. 246-251; Moran v. Plankinton, 64 Mo. 337; Green v. Von der Ahe, 36 Mo. App. 394; Union, etc., Co. v. Traube, 59 Mo. 355; Ruddle v. Horine, 34 Mo. App. 620, 621.

Redding & Owen for respondent.

(1) A release operates upon matters and things mentioned in it, which existed at the time of its execution and delivery, and will not be construed out of its general terms to defeat a cause of action arising afterwards. 20 Am. and

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Eng. Ency. of Law, 745. (2) Though general in its terms it will be limited to those things contemplated by the parties at the time it was made. 20 Am. and Eng. Ency. of Law 746. A release will not be construed as to include the rights of which the lessor was ignorant when he executed it. Ibid. Arnett v. Railroad, 64 Mo. App. 373; Railroad v. Artist, 23 L. R. A. 582; Gumley v. Webb, 44 Mo. 455; 1 Beach, Modern Contract Law, 563; Railroad v. Artist, 60 Fed. Rep. 365; Shemon v. Ins. Co., 83 Wis. 507; Redfield v. Ins. Co., 56 N. Y. 358. (3) There was no consideration for the release. The words in a release should not be extended beyond the consideration. Codding v. Wood, Gen. Digest, 1601; 20 Am. and Eng. Ency. of Law, 744; Riley et al. v. Kershan, 52 Mo. 24; Bigbee v. Coombs, 64 Mo. 529; 2 Parson's Contract [6 Ed.], 688. (4) In the case of Hoffman v. Accident Indemnity Co., 56 Mo. App. 309, Judge Smith says: "If the condition of a contract of insurance is capable of two meanings, that meaning must be adopted which is most favorable to the insured." Wharton on Contracts, sec. 670; Bliss on Ins., sec. 385; Cook on Ins., sec. 4; Hoffman v. Ins. Co., 32 N. Y. 405; Potter v. Ins. Co., 5 Hill 149; Hale v. Ins. Co., 46 Mo. App. 508; La Force v. Ins. Co., 43 Mo. App. 530.

SMITH, P. J.—The defendant executed and delivered to plaintiff an accident insurance policy, by the terms of which the former insured the latter against bodily injuries sustained through external, violent and accidental means, and thereby bound itself to pay the indemnity provided in the schedule thereto, as follows:

"* * *

"(C) Or, if loss by actual severance at or above the wrist or ankle of one hand or of one foot shall so result within ninety days, the company will pay one-third the principal sum before named, which payment shall terminate the policy and discharge the company.

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"(D) Or, if the irrecoverable loss of the sight of one eye shall so result within ninety days, the company will pay one-eighth of the principal sum of the policy, which payment shall terminate the policy and discharge the company.

"(E) Or, if such injuries, independently of all other causes, shall immediately, continuously and wholly disable and prevent the insured from engaging in any work or occupation for wages, the company will pay $12.50 per week during the continuance of such disability for a period not exceeding fifty-two weeks."

On June 26, 1898, plaintiff fell from a tree, in consequence of which he received several bruises, contusions and cuts about the head, and of which accident prompt notice was given the defendant.

On the twenty-fifth of July, following, the plaintiff presented to defendant a claim for $51.78 as indemnity for loss of time from his occupation which had resulted to him in consequence of the said injury. The defendant allowed the plaintiff's claim and on July 28, 1898, mailed him a check therefor, which was accompanied by a voucher which was signed by plaintiff and returned to defendant, and which recited that, in consideration of the payment of $51.78 he thereby discharged and released the defendant from all claims for indemnity under said policy resulting from the said accident.

On August 4, 1898, the plaintiff gave the defendant another notice of the receipt of his said injury, wherein it was stated that since said accident he had lost the "entire sight" in his left eye. It is conceded "that plaintiff was so injured that he sustained immediate, continuous and total loss of time for the prosecution of every kind of business pertaining to his occupation during the space of four weeks and one day. That as a part of the aforesaid injuries resulting from such striking, plaintiff's left eye was hurt; that he noticed that it was getting bad and that the sight thereof was failing about

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two or three weeks after the said fall; that the eye continued steadily to grow worse and the sight thereof to fail, and about the first of August, 1898, plaintiff became convinced he would lose the sight of that eye, and he did irrecoverably lose the sight of his left eye on or about August 4, 1898."

This suit was brought on said policy to recover three hundred and twelve dollars and fifty cents—or, one-eighth of the entire indemnity provided in the policy where the irrecoverable loss of the sight of one eye results from the injury within ninety days thereafter. The defendant in its answer alleged that the plaintiff had received and accepted said sum of fifty-one dollars and seventy-eight cents in full payment and settlement for the injuries resulting from the said accident and had signed and sealed a written instrument to that effect, in and by which in consideration of said payment plaintiff released and discharged defendant from all claims for indemnity under said policy. The said release was pleaded in bar of the plaintiff's action.

There was a trial before the court on a statement of facts agreed, which resulted in judgment for plaintiff and from which defendant appealed.

It is not disputed but that the plaintiff, under the policy, was justly entitled to the indemnity paid him for loss of time from business resulting to him from the accidental injury which he sustained. But it is contended, in view of the fact that plaintiff, in consideration of the receipt of the indemnity specified in provision "E" of the policy schedule, had executed the release pleaded, which, by its terms, discharged defendant from liability from all claims for indemnity under the policy resulting from said injury, that the plaintiff is not entitled to the indemnity claimed by him under provision "D" of the said schedule. The payment of the $51.78 was the consideration for the discharge of the defendant from its liability for indemnity for disability mentioned in provision "E" of the said schedule.

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If its terms are such as to discharge defendant from liability to pay indemnity for disabilities specified in other provisions of said schedule, it can not in so far be held inoperative since there is no consideration therefor moving from the defendant to plaintiff. Wesson v. Horner, 25 Mo. 81. The payment made was for loss of time entailed by the plaintiff's disabilities. The liability for indemnity for the irrecoverable loss of the eye was not in contemplation of the parties at the time of the payment, for such loss had not then occurred; so that the payment could not have been in discharge of any such liability. The release was broader than its supporting consideration. The consideration for the discharge of one liability does not necessarily constitute the consideration for the discharge of another, different and independent liability. Redfield v. Ins. Co., 56 N. Y. 354.

Looking at the receipt, which is termed a "release," in the light of the facts agreed in the case and we must conclude that it was intended to extend only to such claims for indemnity as should be made under provision "E" of the schedule. The purpose of the receipt, no doubt, was to preclude the plaintiff from making any further claim for indemnity under that provision of the schedule. It follows therefore, that the release pleaded constitutes no bar to the plaintiff's action.

But the defendant invokes the application of the principle of the maxim, "*memo debt bis vexari pro una et eadem causa.*" It is true that it is the well-settled rule of law in this state that an entire claim or contract, or a wrong done can not be divided or split up and made the subject of several suits. Ruddle v. Horine, 34 Mo. App. 616; Green v. Von der Ahe, 36 Mo. App. 394; Moran v. Plankinton, 64 Mo. 337; Railway v. Traube, 59 Mo. 355.

But this rule is not of universal application. The prohibition of the rule "presupposes knowledge of the constituent elements of a cause of action sought to be unwarrantably divided. If this be true, and it be true also that the law does

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not require what is impossible, then it must needs follow that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ignorance of the full extent of the wrongs received or injuries done." Moran v. Plankinton, 64 Mo. 337; Farrington v. Payne, 15 Johns. 432; Resley v. Squires, 53 Barb. 280. At the time of the payment of the indemnity for the disability specified in said provision "E," the plaintiff did not know that he would irrecoverably lose the sight of his left eye. It is conceded that the plaintiff's eye was hurt by his fall and that he noticed two or three weeks thereafter that it had grown worse, and that his sight had continued to fail, but that he did not feel that he would lose it until about the first of August. It is not disputed that he irrecoverably lost his sight a few days later. It does not appear that he was advised by his physician or that he knew, or could have known, at the time of the receipt of the indemnity that he would irrecoverably lose the sight of his eye. He then had no claim for indemnity for the loss of an eye. The plaintiff's claim for indemnity for the loss of the sight of his eye falls within the exception to the rule just stated, and therefore his right of action thereon is not foreclosed by the acceptance of the indemnity for loss of time.

It is in this connection to be further observed that it has been ruled in this state that where several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues, but where no action is brought until more than one is due, all that are due must be included in one action; and if an action is brought where more than one is due, a recovery in that action will be a bar to a second action brought to recover the other claims that were due when the first was brought. Railway v. Traube, 59 Mo. 355; West v. Moser, 49 Mo. App. 201. Here were two claims for indemnity arising under different provisions of the policy, each payable at different times, and no reason is perceived why separate actions could not have been brought on each. The situation of the parties to this action

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would not have been different if the plaintiff had reduced his first claim for indemnity to judgment and the defendant were relying on that instead of the supposed release as a bar. If the judgment would bar so would the release.

If the plaintiff had first claimed and obtained indemnity for the loss of his eye under provision "D" of the policy schedule that, by the terms thereof, would have discharged the policy; but the payment of plaintiff's claim for indemnity under provision "E" had no such effect. It is apparent from the very terms of the latter provision that no such effect was contemplated by it. But it is insisted that under the policy the plaintiff could have but one indemnity for the disabilities resulting from his injuries. If the plaintiff had lost an eye and a hand by reason of the injury, he would have been entitled to indemnity for the former under provision "C," and for the latter under provision "D," but not under both, for it is provided in each that the payment of indemnity thereunder shall terminate the policy. So that a payment under one of these provisions would render the policy nugatory as to all the others. But the payment of indemnity claimed under provision "E" is not attended with any such consequences.

It may be that the policy provisions in relation to indemnity are capable of a meaning different from that which the plaintiff contends. Unquestionably, these provisions are capable of two meanings. The rule is, that where the provisions of a policy are capable of two meanings, that meaning must be applied which is the most favorable to the assured, even though it was intended otherwise by the insurer. Hoffman v. Ins. Co., 56 Mo. App. 301; LaForce v. Ins. Co., 43 Mo. App. 530; Hale v. Ins. Co., 46 Mo. App. 508. Applying this rule to the provisions of the present policy relating to indemnity and it is clear that we must adopt the plaintiff's interpretation and hold the defendant liable.

It results that the judgment must be affirmed. All concur.

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WILLIAM M. LECKIE, Appellant, v. E. J. ROTHENBARGER et al., Respondents.

Kansas City Court of Appeals, February 5, 1900.

Partnership: LIABILITY OF SECRET AGENT: SUING PARTNER. **A secret agent of an undisclosed principal who enters into a partnership becomes a member of such partnership as far as the remaining members ignorant of his agency are concerned and can not at law sue such partnership.**

Appeal from the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

Cunningham & Dolan for appellant.

(1) The instruction complained of was not based upon the pleadings. Instructions should limit the issues to those made by the pleadings. Gessley v. Railway, 26 Mo. App. 156; McMurry v. Martin, 26 Mo. App. 437; State v. Sitlington, 51 Mo. App. 252; Scott v. Allenbaugh, 50 Mo. App. 130. (2) There can be no evidence on which to base an instruction, if such evidence overthrows the pleadings of the party who introduces it. Capital Bank v. Armstrong, 62 Mo. 59. (3) The declaration of law ignored the material issue of the fact raised by the pleadings, viz.: Was appellant a copartner with the respondents in the Castle Rock Mining Company? Russell v. Railroad, 26 Mo. App. 368; McDonald v. Cable Co., 32 Mo. App. 70; Bailey v. Beasley, 32 Mo. App. 406; Welsh v. Edmisson, 46 Mo. App. 282. Partnerships are not created by implication or operation of law, apart from an expressed or implied intention and agreement to constitute the relation. Bates on Partnerships, sec. 3. A similar question to the one in the case at bar arose in McDonald v. Matney, 82 Mo.

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358. (4) The facts hypothecated by the declaration of law complained of show that Mrs. Leckie was a partner with the respondents in the Castle Rock Mining Company, and Leckie, the appellant, was not.

Thomas & Hackney for respondents.

(1) The second declaration of law given by the court properly declared the law. The plaintiff did not disclose to defendants that he was acting for his wife, but led them to believe that he was acting for himself in going into partnership relation and carrying on the partnership business. Not having disclosed his principal, he made himself personally responsible to the defendants, and thereby became, as to them, their copartner. 1 Am. and Eng. Ency. of Law [2 Ed.], pp. 1122, 1123. This is the settled law in Missouri. McClellan v. Parker, 27 Mo. 162; Hamlin v. Abell, 120 Mo. 188; Porter v. Merrill, 138 Mo. 555.

ELLISON, J.—Plaintiff sued defendants on items of debt, charging them to be a partnership under the name and style of the "Castle Rock Mining Company."

The answer, among other things, charged that plaintiff was a member of said partnership. The evidence tended to prove that plaintiff was, ostensibly at least, a member of the partnership. That he went into and continued in the partnership in his own name. That the other members of the partnership supposed he was acting for himself, he never disclosing to them anything to the contrary. But it seems that he was, in reality, acting as the secret agent of his wife. The trial was before the court without a jury and a declaration of law was given to the effect that, if plaintiff went into and continued in such partnership in his own name, without disclosing that he was an agent for his wife, and the other partners, having no knowledge of his agency, supposed he was acting for himself, then he was, as to the remaining partners, a mem-

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ber of the firm; and there never having been a settlement of the partnership affairs, plaintiff could not recover. The finding was for defendant under this declaration.

It being conceded that one partner can not sue his fellow partners prior to an adjustment of the partnership affairs, the question presented here is, does a secret agent of an undisclosed principal become a member of a partnership to the remaining members who are in ignorance of his agency? We are of the opinion that he does. Such is the rule of law in other business relations and we can not discover any reason why it should not be applied to a partnership.

In matters of contract, the secret agent can be held as originally liable, or the principal, when discovered, can be held. McClellan v. Parker, 27 Mo. 162; Hamlin v. Abell, 120 Mo. 188; Porter v. Merrill, 138 Mo. 555. So a creditor of a partnership could maintain an action against the secret agent, or he could hold the undisclosed principal when discovered. But persons by entering into a partnership enter into contractual relations with each other, and the same rule of law finds application as between them. The agent may be held by them to the responsibilities of a partner in fact. We do not see that the case of McDonald v. Matney, 82 Mo. 358, has any application to this case.

The judgment is affirmed. All concur.

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R. J. GRAHAM et al., Appellant, v. J. G. WOMACK, Respondent.

Kansas City Court of Appeals, February 5, 1900.

1. **Landlord and Tenant:** POSSESSION: VOID LEASE: OUSTER. **Where tenant's lease has been forfeited but he remains in possession neither the landlord nor his subsequent lessee can forcibly eject him but must resort to legal process to gain possession.**

2. **Injunction:** LAND TITLE: EJECTMENT: ACTION. **An injunction will not lie as an original proceeding to try the title of land and mines thereunder though it may be resorted to as an auxiliary remedy to ejectment which is the proper action.**

3. ———: POSSESSION: INSOLVENCY: TRESPASS. **Where the landlord has clear right to the possession and is insolvent and threatening irreparable injury, his trespass may be restrained; and much more so where plaintiff is in possession, whether defendant is solvent or insolvent.**

Appeal from the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

REVERSED (*with directions*).

F. M. Redburn and *J. W. McAntire* for plaintiffs.

(1) The plaintiffs being the lessees of the owner in possession had no adequate remedy at law, and could resort to a court of equity. High on Inj. [3 Ed.], sec. 702; Wilson v. Mineral Point, 39 Wis. 160; Wren v. Walsh, 57 Wis. 98; Johnson v. Rochester, 13 Hun. 285; Newaygo v. Railway, 64 Mich. 114. (2) The defendant's continued trespasses and tearing up posts, coupled with threats of continuing such removal, he being insolvent, would warrant relief by injunction as well as upon the ground of inadequacy of the legal remedy, as for the prevention of a multiplicity of suits.

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Turner v. Stewart, 78 Mo. 480; High on Inj. [3 Ed.], sec. 702; Owens v. Crossett, 105 Ill. 354; Crescent City v. Simpson, 77 Cal. 286. (3) The defendant is shown to have been threatening and intimidating the employees of plaintiffs, and using unlawful means to force them to quit work. Under such circumstances injunction was the proper remedy. Shoe Co. v. Saxey, 131 Mo. 212; Turner v. Stewart, 78 Mo. 480. (4) Injunction is the proper remedy to prevent injury to or destruction of one's lawful business by the wrongful conduct of others. The general ground for the jurisdiction of equity in such case is that the injury can not be fully compensated by an action at law. In such case the damages are incapable of any fair estimation. Railroad v. Springfield, 85 Mo. 674; Railroad v. Railroad, 69 Mo. 65; Glassner v. Anheuser-Busch Ass'n, 100 Mo. 508; Schopp v. St. Louis, 117 Mo. 131. (5) The court should have granted the injunction and made it perpetual. Sherry v. Perkins, 147 Mass. 212; Murdock v. Walker, 152 Pa. St. 595; United States v. Elliott, 64 Fed. Rep. 27.

T. B. Haughawout and *J. C. Trigg* for respondent.

(1) The defendant was in exclusive possession of the land in controversy under color of right, from June, 1897, to May, 1898, prospecting the same for mineral ores, etc. Under these circumstances the injunction will not be allowed except upon a very strong showing. High on Inj. [3 Ed.], sec. 731. (2) Injunction will not lie as an original and independent proceeding to determine title to lands and mines laid thereunder, where the same are held by defendant under claim and color of title. High on Inj. [3 Ed.], 732; Smith v. Jameson, 91 Mo. 13. (3) In a case like the present an action of ejectment would be an appropriate remedy to test the right and try the title to the disputed land in question; and in such an action, and as auxiliary thereto, if the facts warranted it, and under proper averments, an injunction,

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pendente lite, might be appropriate and amply secure all the just rights of the plaintiffs in the premises. Smith v. Jameson, 91 Mo. 13; Janney v. Spedden, 38 Mo. 395; Majors Heirs v. Rice, 57 Mo. 385; More v. Perry, 61 Mo. 174; Tamm v. Kellogg, 49 Mo. 119. (4) The foundation of the jurisdiction of equity by injunction in this class of cases rests in the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits; and where facts are not shown to bring the case within these conditions, the relief will be refused. High on Injunction [3 Ed.], sec. 697. (5) The defendant being in exclusive possession of the land in controversy at the time of the attempted entry of the plaintiffs thereon, and no irreparable injury having been shown, the authorities relied upon by the plaintiffs do not apply. Equity will not enjoin a mere trespass to realty as such, in the absence of any element of irreparable injury. High on Inj. [3 Ed.], sec. 697; German v. Clark, 71 N. C. 417; Smith v. Gardner, 12 Ore. 221. (6) In the case of trespass against mines, the injury must be something more than a mere fugitive and temporary trespass, for which adequate compensation could be obtained in action at law; it must be an injury to the *corpus* of the estate. Sedgwick & Wait, Trial of Title to Land [2 Ed.], sec. 626; High on Inj. [3 Ed.], sec. 731. (7) So it is proper to refuse an injunction, when plaintiffs' right is by no means clear and when his remedy at law is adequate; and when defendant is in possession under claim of title made in good faith, it is proper to leave the parties to their remedy at law to determine the question of title. High on Inj. [3 Ed.], sec. 732.

SMITH, J.—This is a suit in equity. The petition contained, amongst others, the following allegations:

That said defendant daily enters upon said premises and by threats and intimidations has driven the men employed by plaintiffs from said premises; that said defendant has threat-

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ened great violence to men employed by plaintiffs in conducting mining operations on said premises, by cursing and abusing them, and threatening their lives if they continue to work on said premises. That by his willful and wrongful acts, he has driven the plaintiffs' employees from said premises, and by his threats and intimidations has compelled plaintiffs to desist from lawfully pursuing mining operations on said premises, greatly to their injury and damage. That said defendant is wholly insolvent and that the injuries complained of are irreparable, and that the plaintiffs have no adequate remedy at law. Wherefore, plaintiffs pray that said defendant may be enjoined and restrained from going upon said premises, and from disturbing and interfering with the plaintiffs and their employees in the prosecution of mining operations thereon, and for such other and further relief as may seem meet and necessary in the premises.

The facts of the case, as disclosed by the evidence, are these: Mitchell executed a written ten year lease to Kane of a certain forty acre tract of land which contained a number of provisions, one of which was that Kane or his assignees should immediately commence the work of mining on said land, cause the same to be done for lead and zinc ore in good faith, and place certain mining machinery, pumps, etc., on said land so as to efficiently mine the same. Another required Kane to mine said land in a workmanlike manner, to prospect the ground continuously and to be idle at no time more than thirty days, etc. And there were still others to the effect that a failure to comply with the requirements of the lease in good faith at any time should terminate it and that Kane could, on giving thirty days notice in writing, surrender the lease, etc.

It seems that there were others interested in the lease with Kane, though he was the only lessee therein named. On July 27, 1897, Kane and his associates executed a written assignment to defendant of a one-fourth interest in the lease from Mitchell to Kane. It was therein recited that in consideration

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of the assignment of the interest in said leasehold that defendant should immediately commence the work of prospecting said land for lead and zinc ores and continuously, diligently and in good faith prosecute the same for six months, or, until pay ore was developed. There was also a provision therein that a failure on the part of defendant to comply with the requirements of the contract in good faith should be deemed an abandonment of it and that the assignors and lessors on giving fifteen days notice in writing could declare the contract terminated.

The defendant was placed in possession of the *locus in quo* and during the succeeding six or seven months made a plat thereof, subdividing it into mining lots, sunk three or more shafts therein and sublet some of the lots to others. But it seems that the prospecting thereon was not carried on continuously or diligently, as required by the provisions of the two leases. Indeed, all the work done thereon could probably have been performed in a few days, or weeks, at most. Mitchell, the original lessor and owner of the fee became dissatisfied with the failure on the part of Kane and his assignee and sublessee, the defendant, to comply with the requirements thereof and demanded a surrender of the lease.

Kane and his associates in the meantime vainly endeavored to induce the defendant to comply with his contract. A compliance by the defendant with his contract with Kane and his associates would have been as well a performance of the original lease by Mitchell to Kane, since the requirements of the two were the same in respect to the prospecting and mining operations on the land. Kane and his associates, in September and November, 1897, gave the defendant written notice that unless he commenced work and diligently and continuously proceeded with the same as required by his contract that they would be compelled, in order to protect their own interests, to declare such contract forfeited and terminated. In the month of March, 1898, Kane surrendered the lease to

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Mitchell; and at about the same time the former and his associates formally declared their assignment and lease contract with defendant terminated. There was evidence tending to prove defendant had notice of the action taken by his lessors.

In May, 1898, Mitchell executed a written lease of said land to the plaintiffs, who immediately thereafter entered upon the same and began the prosecution of their mining operations. At the very threshold of their entry they were met by defendant who warned them not to proceed with their contemplated mining operations. Although the defendant, according to his testimony, had on the land some machinery, mining tools, etc., and that he, with others under him, were engaged in sinking one or more shafts, the plaintiffs did not heed his warning. The defendant further testified that plaintiffs went into possession of the land against his expressed will and compelled his licensees and tenants to recognize them as licensors and tenants to recognize them as licensors and lessors. The plaintiffs had the land surveyed and platted. The defendant twice pulled up and threw away the stakes set by the surveyor to indicate the corners of the plaintiffs' subdivisions of the land. The defendant persisted in asserting and maintaining his right to the possession and strenuously insisted that that right was superior and paramount to that of the plaintiffs.

A reading and consideration of the evidence has convinced us that the lease under which the defendant made claim to the possession had been forfeited and terminated. Kane's lease had been surrendered; it was no longer in force. This resulted from defendant's own delinquencies. He had failed to perform the conditions of the contract which he had entered into with Kane and others. As to whether or not the defendant was still in possession at the time of the plaintiffs' entry the evidence is quite conflicting. If the defendant was still in possession then neither Mitchell nor the plaintiffs claiming under him could forcibly eject him, even though he was holding over after his right under his contract had terminated. The plain-

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tiffs could not in such case take the law into their own hands. They would be compelled to resort to legal process to gain possession. Craig v. Donnelly, 28 Mo. App. 342; Greenleaf v. Weakley, 39 Mo. App. 191; Sitton v. Sapp, 62 Mo. App. 197. It is conceded that defendant was wholly insolvent.

The question now is, whether the plaintiffs claiming under a valid lease, though out of possession, were entitled to the injunctive process of the court against the insolvent defendant, who was in the actual possession? Injunction will not lie as an original independent proceeding to determine the title to land and mines located thereunder when held by defendants under claim of right or color of title. Ejectment is the appropriate remedy in such case. Injunction *pendente lite* may be granted auxiliary to such action. Smith v. Jameson, 91 Mo. 13. In Thomas v. Hukill, 131 Pa. St. 298, a case, on its facts, bearing a close analogy to the present, it was held that where a bill in equity was filed by a second lessee of oil lands, out of possession, alleging a forfeiture incurred by a prior lessee in possession for a failure to perform his covenants, praying for an injunction to restrain further operations, etc., it was not error to dismiss the bill, the plaintiff having an adequate remedy at law. That case is only distinguishable from this in the fact that there, the defendant was not alleged or shown to be insolvent, while here, he was. The reason therefore for denying the injunction there does not obtain here.

Assuming that the plaintiffs were not in the possession yet, as they show what seems to be a clear right thereto under their lease, we can see no reason, since the defendant is insolvent and threatening the irreparable injury alleged in the petition, why he may not be restrained by injunction. But if the defendants had abandoned the possession before the plaintiffs' entry and the latter were in possession at the time of the commencement of the suit, as the evidence of the plaintiffs tend to prove, there can be no question as to the right of

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the plaintiffs to injunctive relief. If the insolvent defendant should repeatedly enter upon the land and dig up and carry away the valuable minerals therein, commit the other threatened injuries complained of and being unable to respond in damages, most obviously the plaintiffs would have no adequate legal remedy. Sills v. Goodyear, 80 Mo. App. 128; Boeckler v. Railway, 10 Mo. App. 448; James v. Dixon, 20 Mo. 79; Echelkamp v. Schrader, 45 Mo. 505; High on Injunctions, sec. 717; Beach on Injunctions, secs. 37, 40, 11, 34.

And even if the defendant were not insolvent injunction would lie in such case. Turner v. Stewart, 78 Mo. 480; and the cases therein referred to; Shoe Co. v. Saxey, 131 Mo. 212.

In any view of the case which we are able to take we think that the plaintiffs are entitled to the relief they seek, and we shall therefore reverse the decree of the court below dismissing the plaintiff's petition and direct a decree to be entered there for the plaintiffs in conformity to the prayer of their petition. All concur.

EFFIE D. McCLURG, Respondent, v. L. E. WHITNEY, Appellant. 82 625 98 1514

Kansas City Court of Appeals, February 5, 1900.

1. **Evidence:** LATTER CONTRACT SUPERSEDING FORMER: PAROL TESTIMONY. A writing complete and perfect in itself and unambiguous will supersede a prior written contract relating to the same subject-matter, and parol evidence will not be admitted to show that such was not the intention of the parties.

2. **Contracts:** LATTER SUPERSEDING FORMER: QUESTION FOR THE COURT. A receipt for a partial payment on real estate not inforcible by reason of its failure to describe the property is superseded by a latter contract fully describing the property and formal in every regard, and the interpretation of such contract is for the court and not for the jury.

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Appeal from the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

REVERSED.

Howard Gray for appellant.

(1) The construction to be given the contracts was a matter for the court and manifest error was committed in submitting the question to the jury. Chapman v. Railway, 114 Mo. 542; Michael v. Ins. Co., 17 Mo. App. 23. (2) The contract sued on described no property, shows on its face that it was only a memoranda and was not signed by the plaintiff. The contract relied on by the defendant was dated two weeks later, is complete in every detail, describes the property, executed in duplicate and signed by both parties. These facts appearing plainly from the mere reading the different papers, the court should have told the jury that the subsequent contract took the place of the prior one. Chrisman v. Hodges, 75 Mo. 413; Taylor v. Fox, 16 Mo. App. 527; Brick Co. v. Barr, 76 Mo. App. 380. (3) The plaintiff signed the subsequent contract and it is plain, contains nothing misleading, and she will not be permitted to say now that she did not regard it as a contract. Chrisman v. Hodges, 75 Mo. 413; Penn v. Brashear, 65 Mo. App. 24.

E. O. Brown for respondent.

(1) The court properly submitted to the jury the question as to whether or not the evidence showed that the original contract was superseded by the instrument of November 1, 1887. This was the controlling question in the case. If no modification of the original contract had been made, then plaintiff's rights were as expressed in the original contract. Upon the plaintiff's own showing, therefore, it is clear that the court committed no error in submitting that question to the

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jury, and the jury were amply warranted by the evidence in finding that there had been no modification, change or substitution and that the plaintiff's rights under the contract of October 17 remained unimpaired. Sutter v. Raeder, 50 S. W. Rep. 813; Mfg. Co. v. Iron Co., 29 Mo. App. 526. (2) The rule in this case is well settled that in the sale of land without condition there is an implied covenant on the part of the vendor to make a good, marketable title to the land, and unless the vendor is able to furnish such title within reasonable time then the plaintiff had the right to rescind the contract and demand the return of the purchase money. Green v. Ditsch, 143 Mo. 1; Mitchner v. Holmes, 117 Mo. 185; Mastin v. Grimes, 88 Mo. 478; Wat. Spec. Per. Cont., sec. 412; 28 Am. and Eng. Ency. of Law [1 Ed.], 70, and note on 71; 28 Am. and Eng. Ency. of Law [1 Ed.], 76-92; Scott v. Davis, 42 S. W. Rep. 714-717; Wilhelm v. Fimple, 7 Am. Rep. 117; Breja v. Pryne, 64 N. W. Rep. (Ia.) 669; Am. Dig. 1896, p. 5499; Deichmann v. Deichmann, 49 Mo. 109; McManus v. Gregory, 16 Mo. App. 382; Hymers v. Branch, 6 Mo. App. 514; Soap Co. v. Sayers, 55 Mo. App. 16; Harwood v. Diemer, 41 Mo. App. 48.

GILL, J.—This is a suit for the recovery of the sum of one hundred and seventy-five dollars, being the amount paid by plaintiff on the execution of an alleged contract for the purchase of some town lots in the town of Ensenada, Lower California. It is alleged in the complaint, filed before a justice of the peace, that defendant failed to carry out his contract to convey the property and plaintiff prayed judgment for return of the advance payment. In his answer, defendant set up, in substance, that the instrument or receipt upon which plaintiff sued was only a memorandum or receipt for the $175, was not the real contract for purchase of the real estate, and that after said receipt was given the plaintiff and one Sloane signed a formal contract for purchase and sale of the

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lots; that said contract between Sloane and plaintiff became a substitute for the original receipt, which then ceased to be of any further binding force or effect. At the trial in the circuit court the plaintiff had a verdict and judgment for the amount sued for and defendant appealed.

I. On facts that are undisputed in this record, the plaintiff can not recover, and the trial court should have given a peremptory instruction for defendant. So far as is necessary to state, the facts are as follows:

In October, 1887, one W. A. Sloane, then residing in southern California, placed in the hands of defendant Whitney for sale some lots in one of the "boom" towns of that country. Sloane had laid off an addition to Ensenada, and it seems had taken Whitney in as a partner—either by virtue of the payment of part of the consideration or for services to be performed in making sales. Whatever that arrangement was, is not material to this controversy. It is now sufficient to say that Whitney negotiated a sale of three of these lots to the plaintiff, Mrs. McClurg, the latter acting through Dr. McClurg, her husband. Whitney was not posted as to the numbers of the unsold lots, but McClurg agreed to give $350 for three of them, one of which was to be a corner lot, and thereupon one-half the purchase price was paid and Whitney gave the following receipt:

"Carthage, Mo., Oct. 17, 1887.

"Received of Effie D. McClurg one hundred and seventy-five dollars ($175), which is one-half payment for three lots one of which shall be on the corner of a block and which are located in the parcel of land known as the Sloan & Whitney addition of Ensenada, in Lower California. The remaining one-half payment is to be made in six months when the undersigned contracts to convey by proper deed to the said Effie D. McClurg the three lots as aforesaid.

"L. E. Whitney."

Without dispute, the evidence shows that immediately

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on the payment of the $175 mentioned in the above receipt, defendant Whitney sent the money with a letter of advice to Sloane in California, and he, Sloane, at once executed in duplicate and returned to Whitney a formal binding contract, which was received by Whitney at Carthage and which was presented to the plaintiff, Mrs. McClurg, who signed the same, keeping one copy and returning the other to Sloane. That formal contract for the sale of the lots was as follows:

"This Certificate and Agreement, made and entered into this first day of November, 1887, at San Diego, California, in consideration of the payments hereinafter mentioned, Witnesseth, that Effie D. McClurg has this day contracted with W. A. Sloane for the purchase of lots Nos. 11, 12, 13, 14 in Block No. Three (3) in Sloane & Whitney's Subdivision of 6 1-4 acres, lots No. 288, 289 and 290 of the town of Ensenada, Lower California, Mexico, according to the official map thereof on file in the office of records in said town, for the sum of $350, of which sum $175 has been paid. The balance thereof, $175, to be paid to the said W. A. Sloane, at his office in San Diego, California, or to his authorized agent at Ensenada on or before six months from this date, with interest at the rate of eight per cent per annum.

"On receipt of said deferred payment and interest, in accordance with the above stipulation, the said W. A. Sloane agrees to execute and deliver to the said party or his assigns, a good and sufficient title deed to the above described property.

"In witness whereof, we have hereunto signed our names the day and year above mentioned.

"W. A. Sloane.

"Effie D. McClurg, Purchaser."

Like many other real estate ventures of that period the "bottom fell out" of Ensenada and the property became almost valueless. Nearly ten years after the above transaction plaintiff met defendant Whitney, and after some talk

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as to whether a deed could be had to the property, and Whitney advising the plaintiff that the property was of very little value, that it was not worth the amount of the deferred payment, etc., plaintiff thereupon demanded of the defendant the return of the $175 which she had advanced on the purchase. This being refused, this action was brought with the result before stated.

At the trial, Dr. McClurg was allowed to give his opinion as to what he considered the legal import of the two instruments of writing quoted above. And though he testified in cross-examination that "when this receipt was taken Dr. Whitney told him he Whitney) didn't know what lots he (McClurg) would get and that he (Whitney) would write to Sloane and have him sign the papers and send them out here (to Carthage) so he (McClurg) would know what he would get and that the paper came and his wife signed it," etc. He (McClurg) gave it as his understanding that the formal contract, received and signed by Sloane and Mrs. McClurg, was of no consequence or binding force except to furnish a description of the property purchased, and that the original receipt signed by Whitney was the sole and only contract between the parties.

This testimony of Dr. McClurg was clearly incompetent. The construction of these writings was a matter for the court and not for the witness. In the absence of fraud or imposition (and of this there is not a shadow of suspicion) parties are bound by their written agreements. The contract dated November 1, 1887, is clear and complete and fully covers every feature of the transaction. It is impossible to give that contract full force and effect without assuming that it was executed in pursuance of or as a substitute for the memorandum made two weeks prior thereto. Everything that was said or done prior to the execution of the formal contract of November 1 became merged in the terms of the latter, and it alone became a memorial of the contract between the parties.

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It is well-settled law, that a contract in writing which is complete and perfect in itself and not ambiguous in its terms, will be held to supersede a prior written contract in relation to the same subject-matter, and parol evidence will not be admitted to show that such was not the intention of the parties. Chrisman v. Hodges, 75 Mo. 413. It is also the settled rule "that a valid contract made in substitution for one of a prior date, annuls the obligation of the former". Pressed Brick Co. v. Barr, 76 Mo. App. 380, and authorities cited.

II. It is manifest upon the face of the papers that the writing of October 17 was given as a mere receipt for the money paid and as a memorandum to hold good until a good and sufficient contract should be executed by Sloane in whom the title was supposed to rest, and that the writing of November 1 was intended as the one and only binding contract for the purchase and sale of the property. The paper first executed was not in fact a good and enforcible contract for the sale of real estate since it failed to describe the property, while the writing last signed and executed by Sloane and Mrs. McClurg was perfect and complete in all respects. It would then be absurd to hold that the parties intended the informal and incomplete memorandum or receipt of October 17 as the contract, whereas they subsequently signed another which was in every respect complete and sufficient.

The trial court not only erred in admitting the above recited testimony, but erred also in submitting the interpretation of these writings, as well as their legal import, to the jury, as was done by instructions given at plaintiff's request. These were matters properly for the court and not the jury. Michael v. Ins. Co., 17 Mo. App. 23; Taylor v. Fox, 16 Mo. App. 527. Since then the record shows that the alleged contract on which this suit was brought had been abrogated and supplanted by another, it must follow that no action can be maintained on the former. The judgment then, which was for the plaintiff, must be reversed. The judges all concur.

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AULTMAN, MILLER & COMPANY, Plaintiffs in Error, v. J. A. HUNTER, Defendant in Error.

Kansas City Court of Appeals, February 5, 1900.

1. **Sales: IMPLIED WARRANTY: EXPRESS AGREEMENT: RECOUPMENT. The sale of a harvester carries with it an implied warranty that the machine was reasonably fit for the purpose for which it was sold, and in so far as it falls short of this warranty its diminution in value goes to the reduction of the purchase price; and a subsequent agreement to fix the harvester so that it will bind, etc., at the next harvest is not inconsistent with the implied warranty but is distinct and separate therefrom and the two can stand together.**

2. **——: ——: PARTIAL PAYMENT: FAILURE OF CONSIDERATION. Where in an action to recover the purchase price of a machine the partial payments equal the value of the machine, there is such failure of the consideration that there can be no recovery.**

Error to the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

H. W. Currey for plaintiffs in error.

(1) Instructions number one and two given by the court are erroneous, because the defendant relied on an express warranty that the machine would bind and do good work, and the implied warranty that the machine was fit for the use for which it was sold was merged in said express warranty. Pavement Co. v. Smith, 17 Mo. App. 264; Lee v. Saddlery Co., 38 Mo. App. 201. (2) By accepting the agreement set out in record, the defendant waived the implied warranty that the machine was fit for the use for which it was bought, and also the express warranty given at time of delivery of machine. Boyer v. Neel, 50 Mo. App. 26.

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GILL, J.—This is an action to recover on two promissory notes executed by the defendant for the purchase price of a certain harvesting machine which the plaintiff sold to defendant in the summer of 1885. The defense pleaded was that the machine was wholly worthless for the purpose for which it was sold and also that plaintiff promised to make it do good work by the beginning of the harvest season of 1886, which was not done.

It seems that in May or June, 1885, just before the wheat harvest of that year, the defendant took the machine to his farm on trial. He used it during the harvest of that year, though the evidence tends to prove that it worked badly. After the season had passed, that is, in August, 1885, the agent for the company went to the defendant and induced him to keep the machine, he, the defendant, at the time executing two notes of $90 each (which covered the contract price) one due August 1, 1886, and the other due August 1, 1887, and the agent at the same time gave to defendant this writing:

"August 17, 1885.

"I hereby agree that we will fix the Buckeye Elevator Binder sold to Mr. J. A. Hunter, so that it will bind and do good work at the commencement of the next harvest.

(Signed) "Nick Johnson, G. A."

The machine was used again in the season of 1886, but according to defendant's evidence worked very poorly. However, the defendant seems to have made a small payment on one of the notes and this was renewed in May, 1887, for a balance of $61. The evidence shows that at the request of plaintiff's agents and their promises from time to time to make the machine work, the defendant continued to use it, but the same proved worthless until it was cast aside and defendant secured another of different make. On evidence tending to prove the foregoing facts the case was submitted to the jury, resulting in a finding and judgment for defendant, and plaintiff brought the case here by writ of error.

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I. The chief complaint is that the trial court by instructions erroneously submitted to the jury the matter of an implied warranty where there was an express warranty. It is in effect claimed, that, because the plaintiff's agent executed the writing of August 17, 1885, by which he agreed "to fix the binder so that it will bind and do good work at the commencement of the next harvest," it was intended to abandon the implied warranty that the machine was fit for the use for which it was sold, and that the purchaser could thereafter rely only on said written undertaking.

We think there is no merit in this contention, and that the trial judge properly told the jury that by the sale of the machine the law implied a warranty on the part of the vendor that said harvester was reasonably fit for the purposes for which it was sold, and that in so far as it fell short of this warranty its diminution in value should go to the reduction of the purchase price. The undertaking to repair, as contained in the writing of August 17, 1885, in no way supplanted the warranty which the law implied when the machine was delivered to defendant. Neither were these agreements in any way inconsistent. There is no reason why they may not both exist at the same time. By the sale of the machine there was an implied warranty that it was reasonably fit for the purpose for which the one party sold and the other party purchased it. It was subsequently discovered that the binder was imperfect and failed to do good work. The plaintiff, by its agent, then declared and promised by the writing that it would repair the machine before the next season so that it would answer the original warranty and do good work. In Pavement Co. v. Smith, 17 Mo. App. 264, it was said: "The general rule denies an implied warranty as to any matter or particular which may be brought within the purview or intendment of the special warranty. But there may be an implied warranty so wholly independent of anything contemplated in the express warranty as to stand by virtue of its own distinctive force."

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In other words, the two warranties may be so distinct and separate that both may stand at the same time and both be enforced. Keystone Implement Co. v. Leonard, 40 Mo. App. 477; Lee v. Saddlery Co., 38 Mo. App. 201-205.

II. The evidence for defendant tended to prove (and the jury so found) that the machine was worth nothing over and above the amount which the defendant paid. That being so, then there was such a failure of consideration that plaintiff was not entitled to recover for the balance of the purchase price.

On the facts found by the jury, the judgment is for the right party and will be affirmed. All concur.

MARSHALL & MICHEL, Appellants, v. LARKIN'S SONS, Respondents.

Kansas City Court of Appeals, February 5, 1900.

1. **Compromise:** PRESUMPTION OF LAW: REOPENING OF LITIGATION. To prevent litigation the law favors settlements of differences and presumes that a deliberate settlement and payment and receipt of the money found due, embraces every element entering into the disputed contract and that the settlement was intended as a finality; and an attempt to relitigate such matters is vexatious and contrary to sound policy.

2. ———: CONSIDERATION: ACCORD AND SATISFACTION. The existence of a *bona fide* controversy as to facts with mutual concessions in compromise furnish a sufficient consideration for a new agreement; and in this case such new agreement may be viewed as an accord and satisfaction and binding, because the accord was executed.

3. **Contracts:** RESCISSION: ACTION. If a settlement of a controversy growing out of a former contract is regarded as a mere rescission thereof, no action can thereafter be based on said former contract, as the rescission terminated the same and all future relations are measured by the new contract on which alone suit can be brought.

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Appeal from the Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

Cunningham & Dolan for appellants.

(1) When a cause of action once accrues it can not be discharged except by actual release. Chapman v. Railway, 146 Mo. 481. A release is an act or writing by which some claim or interest is surrendered to another person. Beach on Modern Contr., sec. 456. (2) "It must, unless made for some new consideration, be under seal to bind the person making it, otherwise it will be nothing more than a promise without consideration to forbear from the exercise of a right which is not binding." Lawson on Contr., sec. 480, and authorities there cited. (3) The promise of respondents on taking back the bad flour, "that they in the future would only send first-class flour in appellants' 'Reindeer' sacks," was simply what they were bound to do under the old contract, and could furnish no new consideration necessary to release damages for a violation of that contract. Beach on Modern Contr., sec. 173; Orr v. Sanford, 74 Mo. App. 187; Lingfelder v. Brewing Co., 103 Mo. 592, 593; Storck v. Metzer, 55 Mo. App. 26; Wendover v. Baker, 121 Mo. 293, 294; Armstrong v. Tobacco Co., 41 Mo. App. 254; Lee v. Saddlery Co., 38 Mo. App. 201; Tiedeman on Sales, sec. 190; Long v. J. K. Armsby Co., 43 Mo. App. 253; Voss v. Maguire, 18 Mo. App. 477. (4) The performance of an act which the party is under a legal obligation to perform can not constitute a consideration for a promise. Beach on Modern Contr., secs. 157, 165, and authorities cited; Robinson v. Jewett, 116 N. Y. 40; Machine Co. v. Pringle, 41 Neb. 265; 59 N. W. Rep. 804; Wendover v. Baker, 121 Mo. 294, 296.

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J. W. McAntire for respondent.

(1) On the twenty-eighth day of January, 1897, after there had been an accounting and balance struck and a settlement agreed upon by plaintiffs and defendants, plaintiffs drew upon defendants for one hundred and sixty-six and eighty-nine one-hundredths dollars to balance account. No matter relating to shipment of flour, complained of by plaintiffs as being unsound, was by express understanding left open for future adjustment, hence such settlement can not be reopened except upon clear proof of fraud or mistake. Pickel v. Chamber of Commerce, 10 Mo. App. 191; Gas Light Co. v. St. Louis, 11 Mo. App. 73; Buffington v. Land Co., 25 Mo. App. 495; Lindersmith v. Land Co., 31 Mo. App. 263; King v. Ins. Co., 36 Mo. App. 140; Pickel v. Chamber of Commerce, 80 Mo. 65. (2) The presumption is that all previous dealings between the parties relating to the subject-matter of the account was settled. Gibson v. Hanna, 12 Mo. 165.

GILL, J.—This is an action for damages growing out of the sale of certain large quantities of flour made by defendants to plaintiffs in the latter part of the year 1896. The principal defense was that the parties about that time met and settled the controversy.

Plaintiffs were wholesale dealers of flour at Joplin, Mo., and defendants were manufacturers of flour at Ellsworth, Kansas. In 1896, and for several years prior thereto, plaintiffs had sold large quantities of a certain brand of flour known as "Reindeer," and for which they had a registered trade mark. This flour was advertised and sold as a superior quality of patent flour. For several years defendants had been furnishing this flour to plaintiffs, the latter sending the branded sacks to the defendants at Ellsworth, where they were filled and returned to plaintiffs' store at Joplin. The business was conducted in this way for a long time without complaint or

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misunderstanding until in October, November and December, 1896, when plaintiffs objected that the flour furnished for the "Reindeer" sacks did not fill the requirement or come up to the grade contracted for. Plaintiffs complained that the flour received during those months was inferior; that there was much dissatisfaction among their customers; that they had been compelled to take much of the flour back, and that their trade had been injured, etc.

Thereupon, in December, 1896, one of the defendants came from Ellsworth to Joplin to adjust and settle the controversy. He went at once to plaintiffs' store and after considerable negotiations, covering more than a day, an agreement for compromise or settlement was reached. As to this, Marshall, one of the plaintiffs and the main witness, testified as follows:

"Finally, I said: 'How do you want to settle?' We estimated what there was in the house and what there was to come in. We of course wanted him to take the flour; he wanted us to take it. We didn't want it, and finally he says: 'I will tell you what I will do. If you will take so much flour, I will take the rest of it.' He wanted us to take so much, I don't know how much, more than I wanted to tackle of inferior flour. Finally we got together on this kind of a contract. He said: 'If you will take 90,000 pounds of flour and handle on your account, we will take the rest of it that comes in and all the rest there is and give you back as much good flour as we take out, if you will bring no claim against us at all on this account, and we will see you get nothing in Reindeer sacks except the best flour we, or any other Kansas miller can grind,' and we settled upon that basis. Then he wanted to know how we would handle the flour in Joplin that was his. We agreed to leave it stored in our warehouse and sack it for him, and act as his agent; do whatever he wanted. Of course, expenses entailed, drayage, sacking, rent, interest, insurance and all those things was to be borne by

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Larkin's Sons. They agreed to that and authorized us to advance whatever money was needed to handle it, in whatever packages they sent us to put it in, whenever they ordered it out, and whenever these amounts of interest and rent and things like that accumulated, simply to make a draft against them to balance it all. That was the agreement and he went home."

From the evidence it seems that the above mentioned agreement was carried out. The Kansas millers took about 222,000 pounds of the defective flour for which they gave to plaintiffs good flour instead, and said 222,000 pounds was taken back into plaintiffs' store, re-sacked, shipped south and sold on the market for and on account of defendants; and thereafter, in January, 1897, following the settlement of December, 1896, these plaintiffs rendered an account of all expenses, etc., attending the storage, insurance and handling of the imperfect flour, drew on defendants therefor and the same was paid.

It seems that the parties considered and treated all these differences occurring in the last three months of the year 1896 as finally adjusted and settled. They continued to deal with each other until the last days of December, 1897 (a year after the above settlement), when another controversy arose over certain flour furnished by defendants. This resulted in a suit being brought in Jasper county by the present defendants against the present plaintiffs, in which the Kansas millers recovered a judgment for about $1,000. The answer here alleges that in the last named action the present plaintiffs interposed a counterclaim for the identical damages now sued for, and that such claim had therefore become *res adjudicata.* The pleadings however of that case were not introduced in evidence and hence the matter is not properly and fully before us.

At the close of plaintiffs' evidence the court instructed the jury to return a verdict for defendants, which was done, and

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from a judgment in accordance therewith plaintiffs have appealed.

I. In our opinion the trial court was right in directing a verdict for defendants. The evidence for plaintiffs clearly and without substantial contradiction, shows that whatever claim they may have had against the defendants for furnishing inferior flour prior to December 18, 1896, was compromised and settled by the agreement of that date. The testimony of plaintiff Marshall establishes this. How then can the plaintiffs hope to go back of that settlement and recover on a claim then and there merged into another contract which has been performed? As well said by a learned court: "To prevent litigation the law favors and upholds the settlement of differences between the parties; and when men deliberately meet together and go over the entire subject-matter of a contract, make what purports to be a final settlement of that contract, and pay and receive the money found due, or give and receive a written obligation in lieu of the money, the law considers that they mean something by so doing, and that what they mean is that every element entering into the contract, which might have been there settled, was settled, and that the settlement was intended as a finality. An attempt to reopen such a settlement and litigate antecedent matters which ought to have been, and might have been, embraced in it, is unjust, vexatious, productive of fraud and perjury, and in every way contrary to sound policy." Pickel v. St. Louis Chamber of Commerce, 10 Mo. App. 191.

It is true that the parties in the case at bar did not reduce their contract of settlement to writing, but that is not material. It is sufficient that concerning the flour dealings had during the last months of 1896 they had a controversy; that they met, as one of the plaintiffs testified, "to adjust this matter of inferior flour," and that after much deliberation they came to an understanding and agreement, whereby these plaintiffs were to retain a portion of the flour, but that a much larger

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portion was to be taken back by defendants, they delivering to plaintiffs a like amount of better flour instead; and that this flour so taken in exchange by defendants, was to be stored, re-sacked and shipped to other markets to be sold on defendants' account; that plaintiffs were to attend to these matters for defendants, and when the work was accomplished defendants were to pay plaintiffs all charges for storage, insurance, re-sacking, etc.—all of which was done and performed as agreed.

II. It is erroneous to contend that the contract or agreement made in settlement was unsupported by any valid consideration, and therefore void. The existence of a *bona fide* controversy as to the facts, the mutual concessions extended by one to the other in compromise and to thereby avoid litigation, furnished a sufficient consideration for the new agreement. Viewed even as an accord and satisfaction the arrangement of December, 1896, became binding and effective because the accord was executed. So, too, is plaintiffs' counsel in error in the contention that defendants, in the matter of compromise, did nothing more, or agreed to nothing more than they were by law compelled to do. In this connection it is said that, in taking back the flour defendants were merely rescinding the contract of sale, and this the law compelled them to do. The conclusion then of that course of reasoning is that the rescinding the sale and taking back the imperfect flour could furnish no consideration for plaintiffs' release of a then existing cause of action. Counsel however overlook the further arrangement that plaintiffs were to take charge of, store, re-sack and ship the property to such places as defendants might thereafter direct. It was then more than a mere rescission of a contract of sale. These mutual acts, done and to be done by the parties respectively, supply a consideration for the obligations assumed and undertaken by both parties.

III. Viewing however the compromise or settlement of December, 1896, and the taking back of the inferior flour, as a

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mere rescission of the prior contracts of sale, and even then plaintiffs have no case. For the contract being rescinded there was left nothing upon which to base an action. By such rescission the former contractual relations between the parties had terminated and a new one had taken its place. And if plaintiffs had cause to complain of anything in the future, it was because of defendants' violation of the terms of the new or substituted agreement, and upon that alone could they sue.

The court below ruled correctly and its judgment must be affirmed. All concur.

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JOSEPH J. SWAIN et al., Plaintiff in Error, v. HERSCHEL BARTLETT et al., Defendants in Error.

Kansas City Court of Appeals, February 5, 1900.

1. **Interpleader:** COLLUSION. **He who brings about contesting claims upon himself can not maintain a bill of interpleader.**
2. **Trusts and Trustees:** STAKEHOLDER: INTERPLEADER: COLLUSION. **A trustee in a deed of trust who has in his hands a surplus after foreclosure and who secures the appointment of an administrator of his grantor's estate in order that such administrator may claim such surplus, can not maintain a bill of interpleader against the suit of his grantor's heirs to recover such surplus on the ground of the administrator's claim.**

Error to the Buchanan Circuit Court.—*Hon. A. M. Woodson*, Judge.

REVERSED AND REMANDED (*with directions*).

Jas. F. Pitt for plaintiffs in error.

(1) A surplus which arises after the death of the mortgagor belongs to and is recoverable solely by the heir.

Whether it will be treated as personalty or realty, depends upon whether it accrued in the lifetime or after the death of the mortgagor. This is a universal rule, and appears to have no exception anywhere, when, as upon the facts disclosed by defendant's answer, the deed makes no attempt to change the rule of law by stipulating expressly that it shall be payable in another way. 24 Am. and Eng. Ency. of Law [1 Ed.], 957; 2 Lewin on Tr. [8 Ed.], side page 952, sec. 25; 2 Washb. on Real Pr. [5 Ed.], 261, sec. 7a; 2 Jones on Mort. [3 Ed.], secs. 1695, 1927; Varnum v. Meserve, 8 Allen (Mass.) 158; Dunning v. Bank, 61 N. Y. 497; Price v. Blankenship, 144 Mo. 203. (2) The answer of defendant was wholly insufficient as a bill of interpleader. It disclosed on its face purely a question of law, and that plaintiffs must certainly recover. This being true, the bill must fail. 3 Pom. Eq. [2 Ed.], sec. 1328; Parker v. Barker, 77 Am. Dec. 794; Railroad v. Clute, 4 Paige (N. Y. Ch.) 391. The doubt must be one of fact not of law. Briant v. Reed, 14 N. J. Eq. 276, 277. Nor must there be collusion or the fostering of an adverse claim. 4 Wait's Actions and Defenses, sec. 1, p. 152; Marvin v. Ellwood, 11 Paige, 368, 374; L. & B. Ass'n v. Joy, 56 Mo. App. 438.

Thos. J. Porter and *Joseph Morton* for defendants in error.

(1) The jurisdiction of the circuit court over the case against defendant Bartlett ended with the January term, since plaintiffs did not take the necessary steps to preserve their right to have this judgment reviewed. The court could not at the May term require defendant Bartlett to pay interest and costs in a case in which final judgment had been rendered the preceding term. Jackson v. Railroad, 89 Mo. 104. (2) Defendant Bartlett was entitled to his attorney fees. This is the general rule in all cases where a bill of interpleader is allowed, and the rule is the same where, as in this case, de-

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fendant sets up as a matter of defense to an action at law, facts which show that he might have maintained a bill upon them. Glaser v. Priest, 29 Mo. App. 1; L. & B. Ass'n v. Joy, 56 Mo. App. 433; Christian v. Ins. Co., 62 Mo. App. 35; Roselle v. Bank, 119 Mo. 84. (3) Defendant Bartlett was clearly entitled to the relief prayed in his answer. Casebolt v. Donaldson, 67 Mo. 308; Adey v. Adey, 58 Mo. App. 408; Green v. Tittman, 124 Mo. 372; Vincent v. Platt, 5 Harr. 164; Buttrick v. King, 7 Metcalf, 20.

ELLISON, J.—Plaintiffs, Joseph and Laura S. Swain, are the only heirs at law of Elizabeth L. Swain. The latter in her lifetime gave a deed of trust on her real property to defendant Bartlett, as trustee, to secure payment of a note for $500 to the Mutual Benefit Life Insurance Company of New Jersey. Afterwards, said Elizabeth L. Swain died intestate and plaintiffs, Joseph and Laura, in order to pay claims against the estate also executed a deed of trust on the same property to plaintiff, Reid, as beneficiary, for $800. Afterwards, default having been made on the first deed of trust, defendant Bartlett, as trustee therein, sold the premises which realized a sum sufficient to pay the note to the insurance company and leave a surplus of $1,561.15. Plaintiffs then demanded this surplus of Bartlett, claiming that they as heirs were entitled to it. Bartlett having doubts as to whether they as heirs, or an administrator of the estate were entitled to the surplus, applied to the probate court asking that an administrator be appointed for the purpose of making claim to the fund, and that court put the estate in the hands of the public administrator, who demanded the surplus of him.

Bartlett then answered plaintiffs' petition, admitting the facts alleged (except that plaintiffs were entitled to the money) and then proceeded to allege that he had asked the probate court to appoint an administrator for the purpose (as we must assume) of making claim to the money. That the adminis-

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trator had been thereupon appointed and had made demand on him for the money. That he was willing to pay to the person or persons entitled thereto and asking that plaintiffs and the administrator be required to interplead therefor, and that he be permitted to pay it into court.

The administrator filed his interplea and plaintiffs filed a motion to strike out all of Bartlett's answer, except that part stating the sum in his hands to be $1,561.15. This motion was brought up for determination at the January term, 1899, of the Buchanan circuit court, when by consent of parties it was agreed that the ruling of the court on the motion might be taken as decisive of the case. The court thereupon, after hearing the motion, overruled it.

The court ordered the parties to interplead for the money, rendered judgment that plaintiffs were entitled to the money, but allowed defendant Bartlett an attorney's fee. It is not clear from the confused record what else was allowed, but it was perhaps interest and costs. No bill of exceptions or motion for new trial was filed at the term when the motion to strike out was overruled. The court then took the matter of allowance of attorney's fee to the defendant Bartlett as part of the costs under advisement until the next term, when an allowance of fifty dollars was made. Thereupon plaintiffs in due time filed their bill of exceptions, etc.

It is now contended by defendant that since plaintiffs did not take a bill of exceptions at the term when the motion to strike out was overruled, no question on the motion can now be considered. The motion to strike out the defendant's answer was decisive of the whole case. The motion involved the only legal question for decision and struck at the whole controversy between the parties. If sustained it left nothing at issue. Under such circumstances, there was no necessity for a bill of exceptions, since the alleged error appears in the record proper. This is not like the case of Barber Asphalt Co. v. Benz, decided this term, for there only a part of the

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defense was stricken out, while here the motion was equivalent to a demurrer and struck at the whole case made by the answer.

The court rendered judgment for the plaintiffs for the surplus in the hands of Bartlett as trustee, less $50 for his attorney's fee, etc., in the interplea. No appeal was taken by Bartlett or the administrator and we have therefore to consider only the question arising on the motion to strike out the answer. That is to say, whether Bartlett was in position to ask the parties to be compelled to interplead for the money in his hands. If he was not, then it was error to make the expense allowance to him which the court made. And that is the contest between the parties.

From Bartlett's answer it appears that those plaintiffs were the only claimants to the money prior to the claim made by the administrator, and that the latter's claim was made at his instigation; that is to say, Bartlett procured the appointment of an administrator so that there might be contested claims for the surplus in his hands. In such circumstances he has no standing in his request for an interplea. He should be regarded as a mere stakeholder. L. & B. Ass'n v. Joy, 56 Mo. App. 438. He must be entirely indifferent between the conflicting interests. 3 Pomeroy Eq. Jur., sec. 1325; Tiedeman Eq. Jur., sec. 570. "He must not have lent himself in any way to further the claim of either party to the fund in controversy." Marvin v. Ellwood, 11 Paige, 374. The whole theory upon which an interpleader is allowed is that the claims against the plaintiff have been made against him without his procurement (Belcher v. Smith, 9 Bing. 82), and without collusion with either claimant. Indeed, an oath to that effect is, in many jurisdictions, required of him. In this case Bartlett himself brought the rival claim into existence by voluntarily going into the probate court and having an administrator appointed, to the end that there might be contested claims. He brought his trouble upon himself. He

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should not have been allowed to ask that the claimants interplead. Plaintiff's motion to strike out his answer should have been sustained.

The judgment will be reversed and cause remanded with directions to render judgment for plaintiff against defendant Bartlett for $1561.15 with interest at six per cent from September 5, 1898 to day of demand. All concur.

JAMES D. GRAHAM, Relator, v. GRANT CONWAY et al., Respondents.

Kansas City Court of Appeals, February 5, 1900.

1. **Prohibition:** APPEAL: SUPERSEDEAS: CONTEMPT. **An appeal from the judgment of the circuit court dissolving a temporary order of prohibition against the execution of a justice's judgment will not operate as a supersedeas so as to prevent the execution of the justice's judgment pending the appeal and authorize the appellate court to punish for contempt the officers and parties enforcing the justice's judgment.**

Original Proceeding in Contempt.

DISMISSED.

T. H. Ensor for relator.

(1) An appeal of a proceeding in prohibition, under the statute of 1895, page 95, carries the entire case with all its orders, rules and judgments to the appellate court for review. An appeal is a continuation of the same case and transfers the entire case to the appellate court without any power of the trial court over the matter except such orders as are necessary to complete its records. State ex rel. v. Lewis, 76 Mo. 370; State ex rel. v. Campbell, 25 Mo. App. 635; Macklin v. Allen-

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berg, 100 Mo. 337; Neiser v. Thomas, 46 Mo. App. 47. (2) The court to which a case is appealed is the one of which the parties are in contempt. State ex rel. v. Campbell, 25 Mo. App. 635. Notwithstanding the law of this state at one time was settled, that an appeal did not keep in force a temporary injunction pending the appeal, yet the legislative act of 1891, page 70, authorized an appeal from the order dissolving an injunction. If the order made by Judge Burnes is to be considered as coming within the injunction law, the statute of 1891 would keep it in force pending the appeal. But this case was brought under the laws of 1895, page 95, which act itself authorizes an appeal and is authority to keep the restraining part of the alternative writ in force pending the appeal. Session Laws of Mo. 1891, page 70; Session Laws of Mo. 1895, page 95.

David Rea and *J. A. Sanders* for respondent.

(1) There can be no contempt on the part of defendants or either of them for what they did, unless there was some order of a court having jurisdiction in force at the time, restraining them from doing what they did. This proposition must be conceded. (2) There was no prohibition or restraining order in force at the time defendants did the things complained of by plaintiff in his petition. The order made by Judge Burnes on the 8th day of May, A. D. 1899, was no longer in force after the hearing and final judgment in the circuit court in the case. (3) An appeal from a judgment dissolving a temporary injunction does not revive or keep the temporary restraining order in force, even if the appeal is accompanied by a supersedeas bond. Leonard v. Ozark, 115 U. S. 465; Teasdale v. Jones, 40 Mo. App. 243; Neiser v. Thomas, 46 Mo. App. 47; Busch v. Dillon, 96 Mo. 56; Wood v. Dwight, 7 Johnson Ch. 295; Doughty v. Railroad, 7 N. J. Eq. 629.

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ELLISON, J.—This proceeding is an application for a writ of attachment against the defendants for contempt. The defendant Conway is a justice of the peace before whom the defendant James Graham as plaintiff commenced a suit of forcible entry and detainer against this plaintiff James D. Graham as defendant and the defendant Daniels is the constable of the township where the action was brought.

Defendant James Graham prosecuted his suit to judgment before defendant Conway, and on a writ of possession being issued the plaintiff here (James D. Graham) applied to Hon. A. D. Burnes, Judge of the fifth judicial circuit, at chambers, in vacation, for a writ of prohibition, prohibiting these defendants from proceeding with a further prosecution of said cause. The judge, on an *ex parte* hearing issued a temporary order, stopping any further proceeding until some further order by the court in term time, and directed that said defendants appear at the succeeding term of the Andrew county circuit court and show cause why said order should not be made final and perpetual.

The cause was heard at such succeeding term, the temporary order of prohibition was dissolved and the application dismissed. Plaintiff here (defendant in the case before the justice) appealed from this judgment of the circuit court to this court, where the appeal is now pending. After the circuit court dissolved the temporary order and dismissed the application, these defendants proceeded with a prosecution of their effort under the writ of possession to put defendant Graham into possession under his judgment aforesaid, and did so put him into possession. Plaintiff, as defendant in the suit before the justice, then began this proceeding, in this court, to have defendants attached for contempt.

The question presented is, whether the plaintiff's appeal from the judgment of the circuit court dissolving the temporary order and dismissing the application, operates to con-

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tinue the temporary order in force during the pendency of the appeal.

The legislature, by an enactment found in Laws 1895, page 95, made some regulations in reference to the procedure in prohibition. Among other things, an appeal was provided for by section 8, in the following words: "Any final judgment in prohibition shall be reviewable by motions for new trial and in arrest, and by appeal, as in other civil actions; but in the case of an appeal from the judgment of any circuit or common pleas court imposing a prohibition, the appeal shall not operate to discontinue or in any wise affect the force of the judgment as a stay of the proceedings in question, until such appeal be determined."

From this statute it appears clearly enough that an appeal from a judgment granting a prohibition will not have the effect to suspend or supersede such judgment pending the appeal. So, it is equally clear that if a proceeding for prohibition was begun in court in the first instance, instead of at chambers, an appeal from a refusal to grant the application would not, of course, have the effect of bringing a writ into existence and staying the proceedings sought to be prohibited, pending the appeal. It is thus seen that an appeal has no effect, one way or the other. The judgment of the circuit court, whether it grants or refuses the writ, remains unaffected, while the appeal is pending, as though none had been taken.

The only difference between the instances just stated and the case under consideration is, that here a temporary order was made at chambers on the *ex parte* showing of the plaintiff, prohibiting defendants from further acts until the matter could be heard at court. Now if an appeal from the judgment annulling the temporary order and dismissing the application is allowed to keep the temporary order in force until the end of the appeal, it would make a temporary order issued in vacation, upon an *ex parte* showing, more effective than a final order on

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a full hearing in term time. It would offer a premium on *ex parte* applications. It was not intended that such unusual result should follow the right of appeal.

The temporary order was not a granting of the writ. It was a mere protection to the applicant until the court could, in regular order, determine whether the writ should issue and when the court refused the writ the office of the temporary order was at an end. The appeal did not affect such order and was not taken from the order dissolving it, but was taken from the refusal of the court to issue the writ.

The question here was before the supreme court of Kentucky and the decision was as we have ruled. Gibbs v. Board, etc., 95 Ky. 471.

Similar questions in relation to injunctions (where unaffected by a statute) have been before the courts, and what is said in such cases is of force here. In Wood v. Dwight, 7 John. Ch. 296, is was stated:

" * * * If the injunction could be revived by the mere act of the party in filing an appeal, it would be giving to him not only a power of control over the orders of the court, but of creating an injunction. The supreme court of this state in Hoyt v. Gelston (13 Johns. Rep. 139), held, that an injunction was not revived by an appeal, so as to operate as a stay of proceedings at law; and the supreme court of the United States in Young v. Grundy (6 Cranch, 51), held, that no appeal would even lie upon an interlocutory order dissolving an injunction. Whether an appeal can be sustained, is a question for the court of errors; but supposing it can be sustained, it is impossible that a process that is duly discharged, and *functus officio*, can be revived by the mere act of the party. How could this court undertake to enforce the process, and punish contempts of it in the very face of the order dissolving it? When a process is once discharged and dead, it is gone forever; and it never can be revived, but by a new exertion of judicial power. It is sufficient, in this case, to declare, that

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the defendant is entitled to pursue his remedy at law, equally as if no injunction had issued." To the same effect see Teasdale v. Jones, 40 Mo. App. 243; Busch v. Dillon, 96 Mo. 56; Leonard v. Ozark, 115 U. S. 465; Hovey v. McDonald, 109 U. S. 150.

It results from the foregoing views that defendants are not, and have not been, guilty of contempt and that plaintiff's application should be dismissed. The other judges concur.

O. V. SLAUGHTER, Appellant, v. JOSEPH DAVENPORT, Respondent.

Kansas City Court of Appeals, December 14, 1896.*

1. **Justices' Courts: AMENDED STATEMENT: PARTIES: JOINT CONTRACT.** In a complaint filed before a justice of the peace it was alleged that defendant promised to pay S, G and B a certain sum for macadamizing a public road. The contract which was in writing promised to pay S, G or B said sum. Held, there was a variance since the statement was on a joint contract and the evidence showed a several contract, and the statement could not be amended by striking out G and B and leaving the suit in the name of S.

2. ———: **APPEAL: CHANGING ACTION: PARTIES.** On an appeal from a justice's court the action that was tried below must be tried in the circuit court; and striking out two parties plaintiff and leaving a sole plaintiff, where a statement alleges a joint contract, changes the cause of action though new parties plaintiff might be added if necessary to a complete determination of the action.

Appeal from the Jackson Circuit Court.—*Hon. John W. Henry*, Judge.

AFFIRMED.

*NOTE.—This case reached the reporter April 17, 1900, without briefs which had been sent to the Supreme Court. See 151 Mo. 96.

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Cook & Gossett for appellant.

W. B. C. Brown for respondent.

ELLISON, J.—The following statement will be sufficient for the points involved, and for the reason upon which our conclusion is based.

Plaintiff and two others, Green and Brooking, jointly sued defendant on a written contract of subscription which promised to pay to "T. W. Green, H. C. Brooking or Orlando Slaughter." Plaintiff obtained judgment before the justice. On appeal to the circuit court, when it developed that the contract was a promise to pay to Green or Brooking or Slaughter, defendant took the ground that the petition declared on a promise to pay to plaintiffs jointly, whereas the evidence showed a contract to pay to either of plaintiffs. Plaintiff contended that the contract was as though the promise was to Green, Brooking and Slaughter. The court ruled against plaintiff, and counsel thereupon asked leave to amend by striking out the names of plaintiffs Brooking and Green, leaving the case to stand in Slaughter's name alone. This was permitted and defendant excepted. The case then proceeded to trial and resulted in a judgment for plaintiff. Defendant thereupon filed a motion for new trial, and the court sustained the motion. Whereupon plaintiff appealed. The ground upon which the new trial was granted is that the cause of action declared on is that of a written contract promising to pay to three jointly, while the evidence showed promise to pay either of the three severally, and that the amendment by striking out the names of the two plaintiffs had the effect to change the cause of action.

Our opinion is that while it may not be true that in all cases where the disjunctive, "or," is used between the names of contracting parties as in this case, that it would necessarily

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mean a several contract, but in this case a subscription paper to obtain subscriptions to aid in macadamizing a road being signed by defendant, we are satisfied its proper interpretation is that it was several—the promise was to pay either of the three. The cause of action alleged was on a joint contract. The amendment changed it to an action on a several contract. Can this be done? It appears not to be allowable under the authorities in kindred cases. Thieman v. Goodnight, 17 Mo. App. 429; Faulkner v. Faulkner, 73 Mo. 327; Baker v. Raley, 18 Mo. App. 562.

Amendments are liberally allowed, especially since the enactment of section 6347, Revised Statutes 1889. But it must be remembered that under the provisions of section 6345, "The same cause of action, and no other, that was tried before the justice shall be tried before the appellate court upon appeal." See Gregory v. Railway, 20 Mo. App. 448, and Evans v. Railway, 67 Mo. App. 255. The cause of action tried in the justice's court was a suit on a joint contract. That tried in the circuit court was on a several contract. The same proof would not meet each case. It is true that the section last referred to contains a provision by way of proviso to what we have quoted—"that new parties, plaintiff or defendant, necessary to a complete determination of the cause of action, may be made in the appellate court." But here no new parties were brought in as parties plaintiff. By striking out two plaintiffs the character of the contract was changed, as well as the contracting parties. If it had been a mere addition of parties without changing the nature of the contract, as if the contract was alleged to have been with three jointly whereas the proof showed it to have been with a greater number; in such instance the additional plaintiffs could be added. The cause of action would remain the same.

It follows from the foregoing that the trial court properly held the contract to be several, and improperly allowed the amendment which changed the cause of action from one joint

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to one on a several contract, and that for the latter error, it properly created the new trial. The order sustaining the motion will be affirmed. All concur.

KANSAS CITY, Appellant, v. JAMES O'CONNOR et al., Respondents. 82 655 d88 281

Kansas City Court of Appeals, February 5, 1900.

1. **Municipal Corporation:** SPECIAL TAXES: SPRINKLING. Special tax against abutting property is based on the idea of an improvement to the property but sprinkling a street is too intangible to be denominated an improvement and a contract for paving and sprinkling a street is *ultra vires* where the contract is entire.

2. ———: ———: ———: ENTIRE CONTRACT. Where the ordinance, the bids, the letting and the contract itself,—all contemplate and provide for the paving, repairing and sprinkling as one work for an entire sum, the transaction is an entirety and a part being illegal and void the whole is void. Smith, P. J., concurring in a separate opinion discussing entire and severable contracts and indivisible and apportionable considerations.

3. ———: CONTRACTS: ULTRA VIRES. An *ultra vires* contract can not be validated by being partly performed.

4. ———: ———: ———: STATUTE OF FRAUDS. *Ultra vires* contracts are prohibited from being made and the corporation can not make them, while contracts within the statutes of frauds are not prohibited from being made but are only prohibited from being enforced.

5. ———: ———: ———: COMPLETELY PERFORMED. Where an *ultra vires* contract has been performed by both sides, the status of the parties has become fixed and the courts will not disturb their condition; but a party can not stand in court upon a contract forbidden by law.

6. ———: ———: ———: ———: REMEDY. While municipal corporation can not enforce an *ultra vires* contract or recover damages for its breach, it may recover the consideration parted with on reliance on the contract and thus disaffirm the same.

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7. ——: ——: ——: **SURETY.** A municipal corporation can not maintain an action on a contractor's bond against his sureties where the contract is *ultra vires.*

ON MOTION FOR REHEARING.

8. ——: ——: ——: **PRINCIPAL AND SURETY.** Where the contract is not unlawful the party who has received the benefit and his sureties are estopped to deny its validity; but a contract to tax abutting property to sprinkle a street is unlawful and the municipal corporation is not estopped to set up *ultra vires.*

9. ——: ——: ——: **VOID TAX BILLS.** Where a city ordinance taxes abutting property to sprinkle a street and issues tax bills in payment thereof, the bills are void and there is no payment or part performance by the city.

Appeal from the Jackson Circuit Court.—*Hon. John. W. Henry,* Judge.

AFFIRMED.

R. B. Middlebrook for appellant.

(1) "It is needless to cite authorities that this bond, although voluntary and not authorized by any statute, is good as a common law bond. All bonds, though voluntary, if they do not contravene public policy, nor violate any statute, are valid and binding on the parties to them." Barnes v. Webster, 16 Mo. 265. (2) The provisions of section 21, article 9 of the Kansas City Charter, distinctly authorize the city authorities to provide for the maintenance and repair (within two years) of work of this character. Section 21, article 9, charter 1889, Kansas City, as amended in 1892, page 162, Revised Charter and Ordinances of 1898. Also section 2, article 9, page 137, Revised Charter and Ordinances of Kansas City, of 1898. (3) The decision by Judge Philips of the federal court, which declared that tax bills for sprinkling, issued on the authority of section 21, article 9, of the Kansas City Charter, are void, and that the city had no power to make a contract binding adjoining property with liens for the payment of sprinkling tax bills, can not be invoked as an au-

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thority in this case, because the conditions of the bond sued on are severable, and the petition has made a severance and seeks to bind the bondsmen, not for a failure to sprinkle the street, but for a failure to maintain and keep in repair the same. "The rule is that where the condition of a bond is entire and the whole be against law, it is void; but where the condition consists of several different parts, and some of them are lawful and the others not, it is good for so much as is lawful, and void for the rest." Presbury v. Fisher, 18 Mo. 52. (4) Defendants are estopped from denying the validity of the contract mentioned in the bond. An admission under seal is conclusive upon the obligor and estops him from asserting or proving to the contrary. The obligors now seek to maintain that there was no such contract, for the reason as they say that the city had no power to enter into it. Under a well known rule of law governing estoppel, defendants are estopped from setting up such a defense as this. Hermann on Estoppel and Res Judicata, secs. 630, 631, 632, 633, 634, 635 and 636; State ex rel. v. Williams, 77 Mo. 463; Brewing Co. v. Niederweiser, 28 Mo. App. 237; State v. Pace, 34 Mo. App. 459.

Scarritt, Vaughan, Griffith & Jones for respondent.

(1) It has been expressly held that Kansas City has no authority to issue special tax bills against private property to pay for sprinkling streets. Ins. Co. v. Prest, 71 Fed. Rep. 817; Chicago v. Blair, 149 Ill. 310; 36 N. E. Rep. 829; Pettit v. Duke, 10 Utah, 311; 37 Pac. Rep. 568; Charter and Rev. Ords. of Kansas City, 1898, secs. 12, 234; Verdin v. St. Louis, 131 Mo. 26, 101. (2) The city exceeds its authority and power when it attempts by ordinance, contract and bond to pay the cost of sprinkling by special taxation. The contract and bond are consequently *ultra vires*, and there can be no liability on such a contract or bond. Cheeney v. Brookfield, 60 Mo. 53; State v. Railway, 75 Mo. 212; Mister v. City of

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Kansas, 18 Mo. App. 217; McQuiddy v. Brannock, 70 Mo. App. 541; Knapp v. Kansas City, 48 Mo. App. 485; Schopp v. St. Louis, 117 Mo. 131; Dill., Mun. Corp., secs. 411, 381, 412, 749; Marsh v. Fulton Co., 10 Wall. 676; Thomas v. Richmond, 12 Wall. 349; Loker v. Brookline, 13 Pick. 353; Clark v. Des Moines, 19 Ia. 119, and cases cited; Brady v. The Mayor, etc., of the City of New York, 20 N. Y. 312. (3) Nor is a party making a contract with a municipal corporation which is *ultra vires*, estopped when the corporation brings an action formed thereon to set up its want of authority to make it. 15 Am. and Eng. Ency. of Law [1 Ed.], pp. 1100 to 1102 and cases cited in notes; Montgomery v. Road Co., 31 Ala. 76; Cheeney v. Brookfield, 60 Mo. 53. (4) A condition to perform an antecedent or contemporaneous contract other than that of the bond itself is construed with reference to and in connection with such separate contract. The bond and contract are part of one and the same transaction. 4 Am. and Eng. Ency. of Law [2 Ed.], p. 685, and cases cited in notes. Oberbeck v. Mayer, 59 Mo. App. 289; Sumner v. Summers, 54 Mo. 340; Cheltenham Brick Co. v. Cook, 44 Mo. 29; Gwinn v. Simes, 61 Mo. 335; Bick v. Seal, 45 Mo. App. 475; Malone v. Fidelity & Casualty Co., 71 Mo. App. 8; Friend v. Porter, 50 Mo. App. 89; Sprague v. Rooney, 104 Mo. 349; McDearmott v. Sedgwick, 140 Mo. 172; Lewis v. Walker, 61 Mo. App. 550; Johnson v. Ragsdale, 73 Mo. App. 594; Harrington v. Crawford, 136 Mo. 467 and citations. No cause of action either *quantum meruit* or sounding in damages can arise from a void contract. Keating v. Kansas City, 84 Mo. 415; Crutchfield v. Warrensburg, 30 Mo. App. 456; Taylor v. School Dist., 60 Mo. App. 372. (5) The question of estoppel does not enter into this case. No question of estoppel can arise under a deed which is void. Douthitt v. Stinson, 63 Mo. 268; Reinhart v. Mining Co., 107 Mo. 616; Schenck v. Stumpf, 6 Mo. App. 381; Crockett v. Althouse, 35 Mo. App. 404; State ex rel. v. Murphy, 134 Mo.

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548; Merriam v. Boston, 117 Mass. 241; Nichols v. Bank, 55 Mo.App. 81.

G. F. Ballingal and *Wm. Moore* for respondent.

(1) The ordinance, contract and bond were without authority of law, *ultra vires*, illegal and wholly void. Chicago v. Blair, 149 Ill. 311; Pettit v. Duke, 10 Utah, 319; Verdin v. St. Louis, 131 Mo. 26, 91; Sumner v. Summers, 54 Mo. 340. (2) The sureties may set up the illegality of the contract in an action against them for the penalty of the bond, for which it is the consideration, and wherever the consideration is partly illegal or wholly illegal, the obligation is void. Bank v. Stegwall, 41 Miss. 142; Thorn v. Ins. Co., 80 Pa. St. 115; Widoc v. Webb, 20 Ohio St. 435; Gwinn v. Simes, 61 Mo. 337; Sumner v. Summers, 54 Mo. 340. (3) If the contract is unlawful or illegal in whole or part, this defeats the entire contract. Bick v. Seal, 45 Mo. App. 475; Friend v. Porter, 50 Mo. App. 89; Connor v. Black, 119 Mo. 126. When contract is void no recovery can be had on *quantum meruit*. Ashbrook v. Dale, 27 Mo. App. 649. (4) When the contract is unlawful or *ultra vires*, and the municipality brings suit on the contract, the contracting party is not estopped from setting up the want of authority to make it. Montgomery v. Road Co., 31 Ala. 76; Sumner v. Summers, 54 Mo. 340; Harley v. Stapleton, 24 Mo. 248; Brewing Co. v. Hazen, 55 Mo. App. 277; City Charter (Revised), 1898, sec. 2, 137; McQuiddy v. Brannock, 70 Mo. App. 544.

ELLISON, J.—The defendant O'Connor is a contractor who paved a street in Kansas City under an ordinance thereof. This action is on the bond given by O'Connor as principal and the other defendants as sureties for the faithful performance of the contract, wherein it was alleged to have been a part of the contract that O'Connor was to keep the street in repair

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for a certain period which he failed to do. The action is for a breach of the contract. A demurrer to the petition was sustained in the trial court on the ground that it did not state a cause of action. The city appealed.

The contract embodied an agreement not only to pave and keep in repair, but also to sprinkle the street in question. The ordinance, the bids, the letting of the contract and the contract itself, all contemplated and provided for the paving, repairing and sprinkling as one work for one entire sum. There was no separation.

That portion of the contract providing for sprinkling the street was *ultra vires.* It was not within the power of the city to lay a special tax against the abutting property of the citizen for the purpose of paying for sprinkling. A special tax against abutting property is based and sustained on the idea that the work for which the tax is laid is an improvement of the property, and sprinkling to keep down the dust, while good for the comfort of the inhabitants, is too intangible to be denominated an improvement of the property. Chicago v. Blair, 149 Ill. 310; Ins. Co. v. Prest, 71 Fed. Rep. 817; Pettit v. Duke, 10 Utah, 311.

We therefore have a contract and a bond which provide for doing a work, as an entirety—inseparable—a part of which is illegal and void. Under such condition the whole contract is void. Virden v. City of St. Louis, 131 Mo. 26; Sumner v. Summers, 54 Mo. 340.

But it is argued for the plaintiff that since O'Connor, the contractor, has been paid for the work as provided by the contract, it has become performed by the city and that he (or his sureties standing in his shoes) can not set up *ultra vires* against the city. The authorities on this phase of the doctrine of *ultra vires* are not in accord. But in our view the reason of the matter is, that if a contract is void it can not be validated by being partly performed. The limit to the right of a corporation to contract is made by the policy of the law

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and a violation of the law ought not to be made to work out the validity of the contract. Thomas v. Railway, 101 U. S. 85. In that case it was said that a right of action on a contract *ultra vires* could not be founded on the withdrawal of a party to it. To hold that it could "is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." The same conclusion is announced in Railway v. Railway, 130 U. S. 22, 38; Railway v. St. Louis R'y Co., 118 U. S. 316-318; Transportation Co. v. Car Co., 139 U.S. 54; Compress v. Planters' Press., 70 Miss. 669; Marble Co. v. Harvey, 92 Tenn. 115; Trust Co. v. Miller, 33 N. J. Eq. 155; Black v. Delaware, 24 N. J. Eq. 455. In Trust Co. v. Miller, 33 N. J. Eq. 162, it is said that: "The supreme court of the United States has recently declared, following a judgment of the house of lords, in which the present Lord Chancellor (Seborne) and the late Lord Chancellor (Cairns), and Lords Chelmsford, Hatherly and O'Hagan concurred, that the broad doctrine is now established that a contract, not within the scope of the powers conferred on a corporation, can not be made valid by the consent of every one of the shareholders, nor can it, by any partial performance, become the foundation of a right of action. Thomas v. Railroad, 101 U. S. 71. While it must be admitted that this doctrine has not received the sanction of every eminent judge who has been called upon to enforce it, yet I think it is now vouched for by such august authority, and is so manifestly supported by sound reason and the highest considerations of policy, that it must hereafter be accepted, universally, as expressing the true rule of judgment in such cases." The view expressed in the foregoing cases is adopted as a correct statement of the law in Reese on *Ultra Vires*, sec. 72.

Contracts *ultra vires* can not be likened to contracts within the statute of frauds where part performance ousts the

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application of the statute. For the former are prohibited from being made and the corporation can not make them. A thing void can not be made valid by relation. While the latter are not prohibited from being made but are only prohibited from being enforced and they are not void, they are simply unenforcible. McGowen v. West, 7 Mo. 569; Alexander v. Merry, 9 Mo. 514; Farrar v. Patton, 20 Mo. 81; Ivory v. Murphy, 36 Mo. 534; Browning v. Walbrun, 45 Mo. 477; Aultman v. Booth, 95 Mo. 383; Minns. v. Morse, 15 Ohio, 568; Child v. Pearl, 43 Vt. 230. The language of the statute of frauds is that "no action shall be brought to charge," etc. While the language of the law is, that no contract beyond the chartered power can be made.

This is a different case from that where a contract *ultra vires* had been performed by both sides, the status of the parties become fixed and the whole matter at an end. In such instances courts rarely disturb the condition in which the parties have placed themselves. Neither party could make out his case without showing his own violation of the law. This case is founded on the fact that a part of the contract, to wit, repair, had not been performed and it is for that alleged dereliction that damages are sought. And in order to sustain its case the city proposes to rely upon a contract which was forbidden by law.

But if, as claimed, the city has paid O'Connor for the work, it must not be understood that it is without remedy. It is without remedy on the contract for that, as we have seen, is void. But it may sue O'Connor on the case it has outside the contract. That is, O'Connor can not keep the consideration and yet refuse to perform the work for which he received the consideration.

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlaw-

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ful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it."

"In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract." Transp. Co. v. Car Co., 139 U. S. 60.

The plaintiff may recover outside the contract "to the extent of the benefit received by the defendant from the execution of the agreement by the plaintiff." Compress v. Planters' Press, 70 Miss. 669; Gas Light Co. v. United Gas Co., 85 Maine, 541; Reese on *Ultra Vires*, sec. 74, and authorities cited.

So far as the relief is concerned, there is analogy between a contract disavowed on account of *ultra vires* and on account of the statute of frauds. In the latter case, as we decided this term in Andrews v. Broughton, if one who has received money or property on a contract which he avoids by the statute of frauds, he is liable to an action for the money, or the value of the property.

Since this remedy of the city is not upon the contract, but rather in disaffirmance of it, and so it is stated by the foregoing authorities, it follows that the sureties are not liable on the bond, for the bond is conditioned for a performance of the contract, which, as we have seen, is an illegal thing and ought not to be performed. The sureties only stand for the principal on the contract. If the contract is void no liability attaches in the absence of a provision to that effect. O'Connor not being liable on the contract, there can be no default and, of course, no liability can attach to the sureties.

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The result is that we affirm the judgment. *Smith, P. J.* concurs and also files separate opinion. *Gill, J.* dissents and asks that the cause be certified to supreme court as being in conflict with the cases of Presbury v. Fisher, 18 Mo. 50, and Peltz v. Eichele, 62 Mo. 171.

It is so ordered.

SMITH, P. J. (*concurring*):—But it is contended by the city that even if the correctness and applicability of the principles already stated be conceded, still the demurrer was improperly sustained. It is insisted that even if the sprinkling part of the said contract is *ultra vires*, that the other part may be enforced. Whether or not this insistence can be sustained depends upon whether or not the consideration for the promise of the sureties is severable, and if so, whether or not the latter is divisible and apportionable to the several parts of the consideration so far as to be attributable exclusively to a valid consideration.

The effect of the contract of guaranty sued on is, as to the sureties, no more than a promise on their part, that if their principal should fail to perform his contract with the city for the doing of the things therein specified, and that in consequence of his default the city engineer should cause such things to be done, then, in that event, they would pay the cost thereof not to exceed the sum of two thousand five hundred dollars. The indemnity was promised to secure the performance of two things, one of which was to keep in repair a certain macadam pavement which was legal and the other to sprinkle said pavement which was illegal. Not illegal in the sense of *malum in se* or *malum prohibitum*, but nevertheless illegal, or contrary to law. Reese on *Ultra Vires*, secs. 56, 57; State v. Distilling Co., 29 Neb. 700.

It seems to us to be an elemental principle of the law of contracts that if there is one entire consideration for two several contracts, and one of these contracts is for the perform-

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ance of an illegal act the whole is void. But where there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may be stated and be enforced though the other fails. Addison on Contr., secs. 299-300; 2 Cheety on Contr. [11 Ed.], 973.

In Webb's Pollock on Contracts [new Ed.], 321, 322, it is stated that, if any part of the consideration for a promise is unlawful the whole agreement is void. For it is impossible in such case to apportion the weight of each part of the consideration inducing the promise. In other words, where independent promises are in part lawful and part unlawful, those which are lawful can be enforced, but where any part of an entire consideration is unlawful all promises founded upon it are void. In Leake on Contracts, 677, it is stated: "If the promise is divisible and apportionable to the several parts of the consideration it may be supported so far as attributable to a valid consideration." In Bishop v. Palmer, 146 Mass. 469, it was said: "As a general rule where a promise is made for an entire consideration, a part of which is fraudulent, immoral or unlawful and there has been no apportionment furnished by the parties themselves it is well settled that no action will lie on the promise."

It has been decided that where one purchased two pieces of land, each for a specific price, and took a conveyance for both and was afterwards ejected from one for defect of title he was entitled to recover on the covenants of warranty. Johnson v. Johnson, 3 Bos. & Pul. 162; Miner v. Bradley, 22 Pick. 459. In Frazier v. Thompson, 2 Watts & Serg. 235, it was said: "If the contract had been that in consideration of all the articles furnished by plaintiff the defendant gave the note, it would be an entire contract and the illegality of the consideration in part would avoid the whole contract. And the reason is that in the supposed case we can not separate the good from the bad. But where the contracts are separate and distinct no difficulty exists."

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In Wooten v. Walters, 110 N. C. 251, it is said: "A contract is entire and not severable when by its terms, nature and purpose it contemplates and intends that each and all of its parts, material provisions and the consideration are common to each other and interdependent. Such contract possesses essential oneness in all material respects. The consideration is entire on both sides. * * * On the other hand, a severable contract is one in nature and purpose susceptible to division and apportionment having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent on each other. Nor is it intended by the parties that they shall be.

"In such contract the consideration is not single and entire as to all its several provisions as a whole; until it is performed it is capable of division and apportionment. Thus though a number of things be brought together without fixing an entire price for the whole, but the price of each article is to be ascertained by rate or measure as to the several articles, or when things, being of different kinds, though the total price is named but a certain price is affixed to each thing, the contract in such cases may be treated as a severable contract for each article although they all be included in one instrument of conveyance or contract." It is further held in the same case that where there is a contract to pay a gross sum of money for a certain definite consideration it is entire and not severable or apportionable in law or equity.

In the present case we have but a single promise to pay a certain sum in gross on the happening of two contingencies. How can such promise be divided and apportioned to the two undertakings of the guarantors? Suppose the two undertakings—two things guaranteed, are severable and distinct, how is the promise of the guarantors to be divided and apportioned? What part of the indemnity which the guarantors promised to pay shall be apportioned to each breach of the undertaking? If one of the undertakings be unlawful must the entire indem-

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nity stand as a security for the performance of the one which is lawful?

It seems to us, in the light of the principles to which we have already referred, that the promise of the sureties is not divisible or apportionable to the several parts of the undertaking of the principal and for that reason can not be enforced. Had it been provided in the contract that if the principal made default in performance thereof that the city could then cause performance to be made at the cost of the sureties not to exceed a certain amount each for the sprinkling and the street repairs—the two together being equal to the amount of the promised indemnity then we would have had a division and apportionment of the promise to each default, and a promise that was susceptible of enforcement as to so much thereof as was supported by a legal consideration. But we have nothing of the kind.

In Peltz v. Eichele, 62 Mo. 171, the question was as to the divisibility of a covenant, to do certain things. The covenantor did not as here enter into a bond of indemnity with sureties thereon to secure performance. The suit was not then as here to recover the entire indemnity for the breach of only one of the undertakings—the lawful one. The question of the division and apportionment of the promise of indemnity did not arise and was not discussed in the case. Accordingly, we think the jugment should be affirmed.

ON MOTION FOR REHEARING.

ELLISON, J.—Counsel cite the case of City of St. Louis v. Davidson, 102 Mo. 149, as being contrary to the foregoing views on the question of *ultra vires.*

We do not think so. That case conceded that if the contract is unlawful estoppel will not save it. It does, however, hold that if the contract is not unlawful or forbidden, the party who has received the benefit can not plead *ultra vires*—

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that he and his sureties are estopped to deny the validity of the contract. Now in this case is it not unlawful to attempt to tax private property without warrant of law? Is it not taking private property without consent of the owner to lay a charge on it for sprinkling? The act of the municipality was not only not authorized, but it was unlawful and the contract, therefore, was void. Cheeny v. Brookfield, 60 Mo. 53.

"Upon a contract which is *ultra vires* in the true sense of that expression, that is, upon a contract relating to matters wholly outside of the chartered powers of the corporation, there is no liability upon the contract; and the corporation is not estopped to set up the defense." 2 Dillon Mun. Corp., sec. 935; 1 Ib., sec. 457.

But another consideration is, that in this case there has really been no part performance by the city. It has not paid for the work, since all it did was to issue void tax bills in settlement thereof.

The motion for rehearing should be overruled, *Smith* and *Gill, JJ.*, concurring. *Gill, J.*, on further consideration having concluded the original opinion is not in conflict with the cases there mentioned by him, concurs therein.

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S. M. VAN CLEAVE, Respondent, v. UNION CASUALTY & SURETY COMPANY, Appellant.

Kansas City Court of Appeals, February 5, 1900.

1. **Accident Insurance:** WARRANTIES: APPLICATION, PART OF POLICY. **An application for accident insurance is examined in connection with the policy issued thereon and held to be a part of said policy and its statement to be warranties, since they were so intended by the parties.**

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2. ———: ———: CONDITIONAL PAYMENT. A policy of insurance by reference may incorporate the statements of the application into the policy and thereby make the payment by the insurer conditional on the truth of such statements which thereby become warranties instead of representations.

3. Insurance: WARRANTIES: REPRESENTATION. A warranty must be literally fulfilled while a representation may be only substantially complied with and a recovery even had if its falsity is not material to the insurer; but if material its falsity will vitiate the policy.

4. Accident Insurance: BENEFICIARY WITHOUT INSURABLE INTEREST. One may without fraud insure his own life for the benefit of another not having an insurable interest in his life.

5. ———: REPRESENTATION: APPLICATION: EVIDENCE: STATUTE. The evidence relating to an application for accident insurance is reviewed and its representation that the beneficiary was the wife of the applicant when in fact she was his mistress, is found to be fraudulent and made with intention to deceive, and section 5849, Revised Statutes 1889, is inapplicable, Ellison and Gill, JJ., holding the statute applicable even though the misrepresentation be a warranty unless it be a willfully fraudulent misrepresentation.

6. Insurance: SOLICITING AGENTS: SECRET INSTRUCTION: REPRESENTATION. While secret instruction to a soliciting agent will not vitiate a policy secured by him and accepted by the company, yet the ignorance of such instructions by the assured will not excuse him from making truthful representation in his application.

7. Accident Insurance: PROOF OF LOSS: AGREEMENT TO PAY: CONSIDERATION. Though a policy of accident insurance might be avoided by reason of misrepresentation in the application, yet, where after death of the insured full information as to the falsity of such representation is laid before the adjusting officer and he agrees to pay the policy to the assignee of the beneficiary, if he will procure the release of the latter, the insurer becomes liable to pay the same upon the presentation of such release and the consideration for the promise is sufficient.

8. ———. ADJUSTER: SCOPE OF AGENCY: APPARENT AUTHORITY. Where an assistant adjuster while occupying the office and performing the duties of the chief adjuster of an insurance company, makes a contract agreeing to pay a policy on certain conditions, such agreement is within the apparent scope of his authority and binds the insurer, notwithstanding secret limitations of his authority.

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9. **Trial Practice: CONFLICTING EVIDENCE: VERDICT.** Where the evidence is conflicting but tends to support the verdict it can not be disturbed.

Appeal from the Jackson Circuit Court.—*Hon. E. L. Scarritt*, Judge.

AFFIRMED.

Pratt, Dana & Black for appellant.

(1) Defendant's demurrer should have been sustained, and at the close of the testimony in the case the court should have declared the law in defendant's favor on the first count of the petition. This case is on all fours with the recent decision of this court in Ashford v. Ins. Co., 2 Mo. App. Rep. 766; 80 Mo. App. 638; 19 Am. and Eng. Ency. of Law, p. 565; Keener v. Grand Lodge, 38 Mo. App. 550. (2) The court should have given defendant's third instruction, as plaintiff showed no right to recover under the second count of his petition. Bishop on Contracts [Enl. Ed.], sec. 488; Pierce v. Kibble, 51 Vt. 559; Melchior v. McCarty, 33 Wis. 252, 254.

Yeager & Strother for respondent.

(1) Whether the beneficiary named in the policy had an insurable interest in the life of the insured is immaterial, because the evidence shows that the policy was taken out by the insured; and the rule is that where the insured takes out an accident policy and pays the premium himself, as in this case, he may have named as beneficiary one having no insurable interest in his life. Robinson v. Accident Ass'n, 68 Fed. Rep. 825; Ins. Co. v. Barr, 68 Fed. Rep. 873; Ins., etc., Co. v. Baum, 29 Ind. 236; Mallory v. Ins. Co., 47 N. Y. 54; Masonic Ben. Ass'n v. Bunch, 109 Mo. 560, 577. (2) The

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statement in the application in regard to the relation of Mamie Van Cleave alias Mamie Crecelius to the insured was neither a representation of fact nor a warranty. Ins. Co. v. Martin, 133 Ind. 376; Lampkin v. Ins. Co. (Colo. App.), 56 Pac. Rep. 1040. (3) The fact that Mamie Crecelius was named in the policy as Mamie Van Cleave, and that she was not the lawful wife of the insured, is no defense in this case. The policy gave her residence and the evidence clearly identifies her as the person intended, and shows that she was known by both names. Overbeck v. Overbeck, 155 Pa. St. 5; De Grote v. De Grote, Pa. St. 50; Story v. Williamsburgh, Mass. Mut. Ben. Ass'n, 95 N. Y. 474; Bachman v. Supreme Lodge, 44 Ill. App. 188; Bogart v. Thompson, 24 Misc. (N. Y.) 581; 53 N. Y. Supp. 622. (4) The policy sued on is "a policy of insurance on the life * * * of any person" within the terms of section 5849, Revised Statutes 1889. Logan v. Fidelity & Casualty Co., 146 Mo. 114. (5) Even if the court should hold that the application was a part of the policy, and that the statement therein of the relation of the beneficiary to the insured was a representation of a material fact and a warranty, still the falsity of that statement is no defense to this suit, because the matter misrepresented in no way contributed to the death of the insured. 2 R. S. 1889, sec. 5849; Klostermann v. Ins. Co., 6 Mo. App. 582; Thassler v. Mut. Life Ass'n, 67 Mo. App. 505; Christian v. Ins Co., 143 Mo. 460; White v. Provident Savings Life Assur. Soc., 163 Mass. 108; Levie v. Ins. Co., 163 Mass. 117. (6) Section 5849 is a valid law, binding upon defendant, which is a Missouri corporation, and entered into and became a part of the policy sued on, which is a contract executed and delivered in Missouri. See authorities, *supra*. The suicide statute: 2 R. S. 1889, sec. 5855; Keller v. Ins. Co., 58 Mo. App. 557; Logan v. Fidelity & Casualty Co., 146 Mo. 144. The "valued policy" law: 2 R. S. 1889, secs. 5897, 5898; Daggs v. Ins. Co., 136 Mo. 382. The

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law prohibiting provisions limiting the time for bringing suits: 1 R. S. 1889, sec. 2394; Karnes v. Ins. Co., 144 Mo. 413. The law prohibiting co-insurance clauses in policies of insurance: Laws of 1893, p. 186. (7) The plaintiff was entitled to recover on the second count of the petition. Williams v. Jensen, 75 Mo. 681, 684, 685; Doctor and Student [Muchall's Ed., 1874], Dialogue 11, Ch. 24, p. 177. (8) Neither the insured nor the beneficiary, nor plaintiff nor any one representing them, was ever notified of defendant's by-laws, or of the limitations, if any there were, upon the authority of defendant's adjuster. He assumed the authority to make the contract alleged in the second count of the petition, and defendant is bound by his acts and agreements. Lungstrass v. Ins. Co., 57 Mo. 107; Ten Broek v. Boiler Com. Co., 20 Mo. App. 19.

SMITH, P. J.—Action on accident policy of insurance issued to one Charles A. Van Cleave. The petition was in two counts, in the first of which, amongst other things, it was alleged that while said policy was in force, the said insured sustained bodily injuries through external, violent and accidental means within the terms of said policy, in that he was killed by reason of the collision of two trains on the Santa Fe Railway; that after the death of the said insured, Mamie Van Cleave, the beneficiary named in said policy, complied with all the terms and provisions of said policy on her part; that afterwards, the said beneficiary, for value received, assigned all her right in said policy to plaintiff, of which the defendant was duly notified, etc.; whereby, plaintiff became entitled to receive the net amount of said policy, etc., and for which he demanded judgment. And the allegations of the second were substantially the same as those of the first with certain additions thereto which we shall allude to, further along.

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The answer of the defendant alleged that the insured, prior to the issuance of said policy, made an application therefor, upon which the said policy was based, and that said application, and the statements therein made, constituted, as expressly stated in said policy, considerations for the issue thereof; and said statements were, by the terms of said application, which was signed by said insured, each and all warranted by him to be true; and such warranties formed a part of the consideration for the issuance of said policy, and that said statements were material representations inducing the issue thereof; that prior to the issuance of said policy the said insured made his application in writing to defendant to be insured by it against accidental death or injuries, and in making said application was asked and required by defendant to answer certain questions and state the facts in regard to certain matters upon a blank furnished him for the purpose; that said application was made and signed by said insured, who at the time warranted each and all of the statements contained therein to be true and complete, and said policy was based upon and issued partly in consideration of the warranties made and contained as aforesaid in said application. Defendant further avers in said application said insured warranted and represented himself as married, and warranted and represented that the name of his wife was Mamie Van Cleave, and requested in said application that the policy for which he applied should be made payable, in case of his death by accident under the provisions thereof, to said Mamie Van Cleave, whose relationship to him he warranted and represented to be that of wife, and defendant avers that said statements were not true; that he was not married at the time to anyone; that there was no person named Mamie Van Cleave; that the woman, if there was any, whom said Charles A. Van Cleave so falsely represented and stated to be named Mamie Van Cleave and to be his wife, was not only not his wife, but

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was or had been his mistress, and was or had been living, associating and cohabiting with him illegally and unlawfully. Defendant further avers that said false warranties, representations and statements were made by said insured for the purpose of inducing defendant to issue to him said policy, and did induce the issuance thereof, and that but for said false warranties, representations and statements defendant would not have issued said policy. Defendant further avers that the relation existing so as aforesaid between insured and the woman whom he so falsely warranted and represented to be his wife, was unlawful and prohibited by the laws of the states of Missouri and Kansas, as well as by the common law.

The replication was to the effect that whatever representations or statements, whether true or false, were made by said insured in and about obtaining and securing the policy sued on herein, in no way contributed to the death of said insured; but the death of said insured was directly caused by the external, accidental and violent means alleged in the petition herein, and whatever representations or statements were, or might have been made by said insured in obtaining and securing said policy, were and are wholly immaterial and in no way affect the validity of said policy, by reason of the provisions of the statute of the state of Missouri in such cases made and provided.

There was a trial by the court without the intervention of a jury. At the conclusion of the evidence the court, as a matter of law, declared that, under the pleadings and evidence its finding must be for plaintiff and gave judgment accordingly. It does not appear upon which count the finding was made.

It is contended that the application is not a part of the policy sued on. It appears from the undisputed evidence that O'Brien, the agent of defendant who wrote the policy in issue, met the insured at the Union Depot in Kansas City just as the latter's train was about to leave there on its run.

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The former handed the latter what is termed a "stub," which was read by such latter. The "stub" inquired for the name, age, residence, occupation, beneficiary, the relationship of such beneficiary, etc. On account of the hurry, the latter gave the former his answers to such inquiries which were then written down by the former on the "stub." The blank application was read and signed by insured and the policy delivered to him. The defendant's agent, a few days thereafter, filled out the application in accordance with the answers written on the "stub." The statements contained in the application are those made by the insured to the defendant's agent before the delivery of the policy. It is not contended that the facts contained in the application are different from those stated in the answers written on this "stub." It was for the convenience of the insured that the answers which were written on the "stub" were not also written in the application before the delivery of the policy. The two are identical and no reason is seen for impugning either the correctness or the integrity of the application.

An important question raised by the appeal is that of whether or not the statements of facts set forth in the application are warranties. The application is in words and form as follows:

"To the Union Casualty Company:

"I hereby apply for a policy of insurance against bodily injuries caused by external, violent and accidental means, said policy to be based upon the following statement of facts.

"* * *

"15. Policy to be payable in case of death by accident under the provisions thereof to:

"Name in full: Mamie Van Cleave.

"Residence: 771 Olive St., Leavenworth, Kans.

"16. Whose relationship to me is that of wife.

"* * *

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"22. I warrant each and all of the foregoing statements to be true and complete."

The said "statement of facts" is divided into twenty-two paragraphs, the only three of which that are material to consider here we have just quoted. The policy recites that, in "consideration of the warranties in the application for this policy and the order" on the paymaster of said railway company for the future payment of the premiums the risk was taken by the defendant. The statement of the application, it seems to us, was as much a part of the policy as if it had been written therein.

And the inquiry now is, whether such several statements are to be considered warranties? As said in Lampkin v. Ins. Co., 52 Pac. Rep., 1040: "The question frequently arises, however, whether a statement in an application is a warranty, and the courts must determine it from a consideration of the language, the context and such other matters as may throw light upon the intention of the parties. The ultimate object is to ascertain what the intention of the parties was, and this fixes the character of the statement. Even materiality may thus sometimes be necessary to be considered as an aid to the determination of the question as to whether or not it was a warranty.

"Parties will not be held to have entered into a contract of warranty unless they clearly intended it, and whether or not this is the case will depend upon the form of the expression used and the apparent purpose of the insertion and, sometimes, upon the connection or relation of the parties to the instrument." May on Ins., secs. 164, 170. And so it has been held that statements in applications for insurance are ordinarily representations merely, unless converted into warranties by reference to them in the policy and a manifest purpose that the whole shall form one entire contract. Ins. Co. v. Meyers, 55 Miss. 479.

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Applying these rules and it seems to us perfectly plain that the statement made by the applicant in the sixteenth paragraph of his application that the beneficiary designated in the preceding paragraph sustained to him the relation of wife was intended to be considered by both parties to that instrument as a warranty. The said fifteenth paragraph named the beneficiary to whom the indemnity was to be paid in case of accidental death under the provisions of the policy, and the succeeding one stated the relation which the beneficiary sustained to the applicant to be that of wife. This relation is stated in an independent paragraph. It is therein asserted as a fact. In one of said paragraphs the beneficiary is designated; and in the other, her relation to the applicant. The independent inquiry was made, in the "stub," of the applicant what relation the person he had already designated as beneficiary sustained to him, and his answer was that she was his wife. By the twenty-second paragraph of the statement already referred to and quoted the applicant "warranted the foregoing statements to be true." This discloses an unequivocal intention of the applicant that the several statements of fact made in the application should be taken as warranties. The reference in the policy thereto shows that the application was accepted and the contract entered into upon the condition that the statements in such application were warranties. This, we think, was the intention of the parties evinced by the language of the statement and the policy. The two must be taken together as one entire contract, and when so considered there is no doubt left but that the statement in the application was intended by the parties to be warranties. We therefore conclude that the statement of the application that the beneficiary sustained to the applicant the relation of wife was a warranty.

It is conceded that the beneficiary was not at the time of her designation the wife of the applicant, but that of one Crecelius. These facts standing conceded, as they do, the

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further question arising is, whether they vitiate the policy? In section 12 of Cook on Life Insurance, it is stated that, although a contract of insurance is in essence a mere contract to pay money on the happening of a specified loss or injury, yet in practice the happening of such loss or injury is not the only condition on which such payment depends. Besides this, the payment is commonly made conditional on the truth of certain statements made by the applicant. The falsity of such statements prevents the liability of the insurer from taking effect. Such statements are called warranties. In another section—15—the same author states that, the policy may by reference incorporate all or a part of the statements in the application, so as to make the payment by the insurer conditional on the truth, not merely of any statements in the policy itself but, also, on the truth of answers contained in the application. Such statements then become warranties instead of representations. In Anderson v. Fitzgerald, 4 House of Lords Cases, 484, it is said that, nothing is more reasonable than that parties on entering into a contract of life insurance should determine for themselves what they think to be material and if they choose to do so and stipulate that, unless the assured shall answer questions accurately, the policy or contract which they are entering into shall be void, it will be perfectly open to them to do so, and his false answer will then avoid the policy.

The difference between a representation and a warranty is that while the latter must be literally fulfilled it is sufficient if the former be substantially complied with. In case of warranty, the parties stipulate the materiality of the matters warranted and cut off all inquiry concerning it. It must be true or there is no contract. A representation may be untrue and a recovery had on the policy if the falsity is not material or prejudicial to the insurer. Life Ins. v. Rogers, 119 Ill. 474; Life Ins. Co. v. Johnston, 80 Ala. 467; Life Ins. v. Neider, 39 Ind. 476; Witherell v. Ins. Co., 49 Me. 200; Ins.

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Co. v. Guebe, 12 Minn. 82. It has been declared by a number of courts of the very highest respectability that in a case of a warranty the contract is conditioned on the absolute truth of the statement, whether made in good faith or not, and the question whether such statement is, or is not material is not involved. Cazenove v. British Equitable Co., 28 L. J. C. P. 529; Barteau v. Phoenix Mutual Co., 67 N. Y. 595; Continental Co. v. Rogers, 119 Ill. 474 (*ante*); Wilkinson v. Ins. Co., 30 Iowa, 119. In Ashford v. Ins. Co., 80 Mo. App. 638, it was stated that, "the policy provided that the statements made in the application should be considered warranties and that if any statement were not true the policy should be void. In such case we have no doubt, leaving the statute out of view, the statement that he was married was material." If material to the risk, the falsity of the representation vitiates the policy. Parties have a right to make such a contract as they please, and if they agree that the truth of a certain statement shall be material to the validity of the contract the court will not interfere.

The beneficiary in the policy sued on most manifestly had no insurable interest in the life of the insured. It is well established that where one of his own free will without fraud insures his own life (paying the premiums therefor) for the benefit of one not having an insurable interest in his life, the policy will be valid. Ashford v. Ins. Co., *supra*. It is alleged in the answer, and established by the uncontradicted evidence, that but for said false representations made by the insured in his application, to the effect that the beneficiary therein named was his wife, the contract would not have been entered into. In the defendant's manual of railroad accident insurance, issued for the government of general agents and soliciting agents, and for the management of the home office, as to insuring railway employees, an applicant for railway accident insurance was restricted in the selection of a beneficiary or beneficiaries, to husband, wife, father, child,

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brother, or sister, or to the "executor, administrator or assigns." There was an exception to this rule which provided that a creditor or friend may become a beneficiary because of a tangible honorable interest in the life of the applicant, and when a creditor or friend was named, the interest of such beneficiary was required to be stated either in the application or by correspondence with the home office. It is thus seen that the agents of the defendant were impliedly prohibited from accepting an application when the beneficiary was other than one of the several classes of persons therein specified. No policy would have been issued on the application of the insured, or, if issued, approved by the home office, had he disclosed the fact that the beneficiary named by him was his kept mistress. In view of this, we can not doubt but that the representation was fraudulent and made with an intention to deceive.

But the plaintiff objects that this rule of the defendant was in the nature of a secret instruction to its soliciting agents, of which the insured had no notice and that therefore it cut no figure in the transaction between the insured and the defendant. It may be, and doubtless is, true that where the agent of an insurance company is furnished with blanks and is authorized to solicit insurance and write policies, that he would have the apparent authority to accord to an applicant the privilege of naming as beneficiary anyone he saw fit, and that if he issued a policy in accordance therewith, and the same should be accepted by the officers of the company authorized to finally approve the issue of the same, that it would bind the company, in case of a loss or injury, under its provisions. But while this is so, the want of knowledge by the insured of the existence of said rule did not excuse him from making truthful representations in his application in respect to facts about which the defendant had inquired of him and which it deemed material to the contract.

If the covenant of the assured, warranting the statement

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in his application for the insurance to be true, that the beneficiary therein named was then his wife was not fulfilled, or complied with, then no operative contract was formed or entered into between the parties; and this, without regard to the question of public policy so much discussed in the briefs of counsel. As already stated, the answer of the defendant was made material by the agreement of the parties, and that therefore any inquiry in respect to that matter was cut off. It has been many times ruled that to defeat a policy it is not required to find the statement contained in the application was fraudulent. Digby v. Ins. Co., 3 Mo. App. 603; Riddle on Ins., sec. 531, note 3 on page 532.

But it is insisted by the plaintiff that even if it is held by us that the application is a part of the policy and that the statement therein of the relation of the beneficiary to the insured was a warranty, that still the falsity of such statement is no defense to the action because the matter so untruthfully stated in no way contributed to the death of the insured. Where a statement contained in an application is a warranty, it is not a representation; but, if it be contained in an application where there is no warranty, then it is no more than a written representation. A representation, whether written or verbal, when untrue or false, is a misrepresentation. A misrepresentation may be innocent, in good faith or fraudulent. If we are correct in the conclusion that the statement made by the insured in his application, viz.: that the beneficiary therein named by him was then his wife, was converted into a warranty and was by the agreement of parties made material to the risk, the question of misrepresentation is not in the case and section 5849 of the statute is inapplicable. But if the statement in the application is to be regarded as a misrepresentation it was not an innocent misrepresentation, but a fraudulent one made as to a fact which was, by the agreement of parties, deemed and made material. The statute has no application to misrepresentation of the

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latter kind. Ashford v. Ins. Co., *supra*. Fraudulent misrepresentation, if material to the risk, will vitiate the policy, whether or not it actually contributes to the contingency or event on which such policy is to become due and payable. The plaintiff's criticism to the construction given by us to said section 5849 in the opinion in the last cited case has not shaken our conviction as to its soundness. Our conclusion is that on the pleadings and evidence the plaintiff was not entitled to recover on the first count of his petition.

The facts alleged in the first count were supplemented in the second by others to the effect that the real name of the beneficiary in said policy was not Mamie Van Cleave but Mamie Crecelius, and that she was not the wife of the insured, who was, at the time of the issue of the said policy, an unmarried man, etc.; that on the fifth of October, 1897, the beneficiary had delivered to the defendant an affidavit and proofs of death which disclosed all the facts in regard to the issue of said policy, the injuries and subsequent death of the insured, the real name of the said beneficiary and the relations existing between the latter and the insured, etc., and that thereafter plaintiff demanded of defendant that it pay him the amount due under said policy, and that on the fourteenth day of the next succeeding month the defendant agreed to and with plaintiff to pay him the amount of said policy on January —, 1898, upon the consideration and condition that he would procure from said beneficiary a release of said defendant from all claims and demands of every kind by reason of the issuance of said policy and the death of said insured, and that such release should be delivered to defendant upon the payment to plaintiff of the amount due on said policy, which release plaintiff then undertook to procure; that plaintiff procured said release in form as required by defendant and notified it of the same; that after the time fixed by defendant for the payment of the amount

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of said policy plaintiff demanded payment, etc., which was refused.

It appears from the evidence that Mr. Strother, who was plaintiff's attorney, went to the office of the defendant's superintendent and manager of its claim department. A person in that office inquired of him what it was he wanted and he answered that he wanted to see the superintendent in regard to a claim against the defendant. The former, after making some inquiry relating to the claim, etc., took the latter into the office occupied by Mr. Atwood, which was that of chief adjuster of the defendant. It seems the defendant then had no chief adjuster but that Mr. Atwood, who had been the assistant chief adjuster was occupying the office and performing the duties of chief adjuster for the time being. Mr. Strother made known the purpose of his visit to Mr. Atwood, who thereupon took up with him plaintiff's claim and entered into a discussion of the same. The result of the meeting was the entering into the agreement alleged in the second count of the plaintiff's petition. Although the testimony of Mr. Atwood and that of his stenographer are somewhat at variance with that of Mr. Strother, the latter very fully sustains the allegations of the second count of the petition, in substance, that if plaintiff would procure the release of the beneficiary in the policy the defendant would, on the delivery thereof, pay the amount claimed under the policy. It also appears from the undisputed evidence that Mr. Strother procured the said release and notified the defendant of that fact, etc.

Mr. Atwood was in charge of the office of the defendant's claim department. In entering into the agreement to pay the plaintiff's controverted claim on the performance of the condition specified by him he was acting within the apparent scope of his authority. If he had any private instructions, or if there was any limitations imposed by the president

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or the by-laws of the defendant on his apparent authority they were in no way brought to the knowledge of the plaintiff's attorney. The act of Mr. Atwood was done in behalf of his principal. The law would presume no further than that his authority was limited by the apparent scope of his principal in the branch of the general business in which he was engaged. We think the transaction between the plaintiff and Mr. Atwood was within the apparent scope of the latter's authority and the limitations, if any, that were imposed upon his authority in no way bound plaintiff. He assumed the authority to make the said agreement and by it the defendant must be bound (Lungstrass v. Ins. Co., 57 Mo. 107; Ten Broek v. Winn Boiler Co., 20 Mo. App. 19; Riddle on Ins., sec. 119), provided it was supported by a sufficient consideration, which, we think, was the case. Williams v. Jensen, 75 Mo. 681; Wirt v. Schuman, 67 Mo. App. 172; 2 Kent Com. [2 Ed.], 465. The authorities referred to by the defendant are inapplicable to a case like this, as is seen from what has been said by us in discussing the liability under the first count. The non-liability of the defendant on the first count is not founded on the theory of either of the defendant's refused instructions, but on that of a warranty uninfluenced by considerations of public policy.

The defendant insists that the finding of the court on the second count was against the weight of the evidence. The rule is that, when the evidence is conflicting and there is substantial evidence to support the verdict it will not be disturbed. Nor do we perceive any error was committed in respect to the admission or rejection of evidence that was prejudicial to defendant. In our opinion, the evidence under the second count was sufficient to support the finding of the court and that the judgment should accordingly be affirmed. All concur.

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ELLISON AND GILL, JJ.

Parts of the foregoing opinion, we think go too far. We believe that even though a misrepresentation is made a warranty, yet the statute, section 5849, Revised Statutes 1889, will nevertheless apply and avoid a defence on that ground, unless it be a willfully fraudulent misrepresentation as stated in Ashford v. Ins. Co., 80 Mo. App. 638.

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3. COMPENSATORY AND PUNITIVE DAMAGES: INSULTING WORDS: MITIGATION. Words will not justify an assault nor mitigate compensatory damages; but matters of aggravation may be shown in mitigation of punitive damages. Ib.

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2. REASONABLE VALUE OF SERVICE OF ASSIGNEE AND ATTORNEY. The rule adopted by the circuit court of the city of St. Louis, "that under no circumstances shall the amount to be allowed an assignee by the court for his compensation and that of his ordinary counsel fees together exceed fifteen per centum of the estate received and disbursed by said assignee, provided, however, this rule is not to apply to attorneys' fees in litigated cases prosecuted or defended by the assignee in behalf of the estate," was intended to express the judgment of that court as to the reasonable value of the allowances to be made for all matters falling within the classification set forth in the rule. Ib.

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1. FRAUDULENT: GARNISHMENT: TRIAL OF ISSUES MADE THEREBY. Respondent company advanced money to defendant Hinrich, and guaranteed other outlays for which defendant would be liable to enable him to fulfill his engagement at Music Hall, St. Louis. Respondent took promissory notes for the money advanced and instituted friendly attachment suits to collect same, the constable executed the writs so as not to disturb the property, the sale of tickets or the operatic performance of defendant's company. Appellant afterward instituted garnishment proceeding on attachment whereby the sheriff took possession of ticket receipts for the last evening of the performance and seized certain trunks, costumes, music and musical instruments as the property of defendant. *Held*, that as the purpose of the attachments by respondent was to hold off Hinrich's other creditors until his engagement at Music Hall had been filled, and the proceeds thereof absorbed by respondent, they were, however, honest in fact, fraudulent in law to whatever extent they hindered and delayed his other creditors. Norton v. Hinrichs, 216.

2. SAME: PREFERENCE OF CREDITORS. Although the attachment suits may have had the effect of shielding the property of Hinrich from his other creditors, yet upon the principle that a debtor may prefer one creditor over another, such suits, unless they did hinder and delay other creditors from collecting their debts, were not fraudulent. Ib.

3. SAME: VOID LEVIES. The levies of the writs of attachment by the constable without his taking possession of the property and of the future receipts arising from the tickets, constituted no levy and was a nullity, as property levied upon must be capable of seizure, and be seized. Ib.

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4. JURISDICTION: WRIT TO NEIGHBORING COUNTIES. Where the defendant in an attachment suit is not a resident of the county in which suit is brought, the court has no jurisdiction to send its writ to a neighboring county unless property is found and attached in the county where suit is instituted. Rubber Co. v. Hutchison, 603.

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2. AGAINST PUBLIC POLICY. To refuse a private banking corporation the right to accept a pledge of its own stock as security for past or present indebtedness, would unreasonably restrict its business for lending money, would injure the stockholder as much as the bank, and generally hamper commerce and be contrary to public policy. Ib.

3. DEPOSIT: TRUST FUND: NOTICE TO BANK. The deposit of money in a bank under the name of Tudor F. Brooks, agent, together with the fact that at and before the time said deposit was opened, the said Tudor F. Brooks notified the officers of the defendant bank, that the money deposited on that account would be funds belonging to persons other than himself, and in which he would have no personal interest, together with the form in which the account was opened, would be notice to the bank of the fact that said fund was a trust fund. Lindsay v. Brooks, 301.

4. SAME: BURDEN OF PROOF. And this state of facts threw the burden upon the plaintiff in the case at bar, of showing that the funds on hand at the time of the garnishment was the property of Tudor F. Brooks. Ib.

5. COLLECTION: CHECK: PRESENTATION: NEGLIGENCE. P. received a check drawn by the bank at S. On the same day in the usual course of business he deposited it with his bank at J. for collection. This bank on the same day in the usual course sent it to the bank at K., which received it on the next day and on the same day, but not in the usual course, forwarded it to the bank at M., twelve miles from S. This bank received it on the next day, Saturday, and mailed it back to the bank at K. where it was received on Monday and on the same day sent to S. But the bank at S. had closed on Saturday. *Held*, the bank at K. was negligent in first sending it to M. when the usual course had been to send direct to S., which it would reach nearly as soon as it would M. And the fact that the bank at K.'s correspondent at S. was suspected of being insolvent, and was in fact insolvent, and closed on the same day as the drawee bank, will not excuse the bank at K. Herider & Herider v. Loan Ass'n, 427.

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6. SAME: NEGLIGENCE: DEFENSE. It is not defense to the above state of facts that each of the banks could under the law have retained the check until the next day, since the negligence consisted in sending it to the wrong place; and to excuse the negligence it must be shown that a person of ordinary prudence at S., after receiving the check on Saturday, would not have presented it until the following Monday. Ib.

7. SAME. An agent receiving a check on a local bank for collection may delay the presentation until the next day; yet if he knows of the failing condition of the drawee bank he should proceed to present it at once and not wait until the time the law ordinarily allows. Ib.

8. SAME. Lack of diligence alone in collecting a check is not sufficient to fasten liability upon the agent, but such failure must be the cause of the injury. Ib.

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10. SAME: RETURN OF: PRACTICE. Where the drawee is insolvent and the check worthless, it is not necessary to return it to the drawer; and its retention indicates no intention of appropriation. Ib.

BILL OF EXCEPTIONS. See PRACTICE, APPELLATE, 1.

1. OFFER OF EVIDENCE: COPYING IN THE RECORD. Where the bill of exception shows that certain evidence was offered but fails to show its admission, it does not become a part of the record and can not be considered by the appellate court although copied in the transcript. Stone v. Baer, 339.

2. EVIDENCE: SHERIFF'S RETURN. A sheriff's return can only get into the record in another case by being offered in evidence and preserved in the bill of exceptions. Rubber Co. v. Hutchison, 603.

3. INTERPLEA: JURISDICTION: PRESUMPTION. An interplea in an attachment case is in the nature of an independent action and its records are to be evidenced and treated separately from the main case, and the circuit court will be presumed to have jurisdiction of goods seized in neighboring county unless the record shows to the contrary. Ib.

BILLS AND NOTES. See ACCOUNT, 1; BANKS AND BANKING, 5, 6, 7, 8, 9, 10.

1. BY CO-PARTNERSHIP: PRESUMPTION REBUTTED. Though a promissory note is admitted to be in the name of the co-partnership, the presumption of liability created by it against all the members of the co-partnership is only *prima facie;* and the court trying the case, if the testimony tends to show that the note was executed for the individual debt of a member of the firm, and the holder of the note knew that fact, would have the right to find against the presumption arising from the face of the note, and for the party denying partnership indebtedness. Kahn v. Overstolz, 235.

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2. SAME: PROVINCE OF THE TRIER OF THE FACT. It is the province of the jury or trier of the fact to determine the credibility of witnesses and weight of their testimony, and when that has been done, as in this case, by a trial judge sitting as a jury, his findings will not be reversed, except upon the clear evidence of unjudicial bias. It not appearing from the circumstances in the record, that the judge was prejudiced in his findings, his conclusion in this behalf, is final. Ib.

3. NEGOTIABLE INSTRUMENTS: BANK CHECKS: PRESENTMENT. Bank checks are negotiable instruments though not expressed to be for value received, but are not designed for general circulation but for immediate payment, and if not promptly presented the holder keeps them at his peril. Bank v. Dreyfus, 399.

4. SAME: PRESENTATION: REASONABLE TIME. A check should be presented in a reasonable time, to-wit, the next day after receipt, unless cause for the delay appears. But where the facts are disputed, what is a reasonable time is for the jury, otherwise it is a mere question of law. Ib.

5. SAME: DISHONORED. A check which, without excuse for delay, is held longer than next day after its receipt, is dishonored and the indorsee takes it subject to equities. Ib.

6. SAME: STALENESS: EQUITIES: INDORSEE. A check held for twenty-six days without effort to present it becomes stale, and an indorsee will then take it subject to all defenses the drawer may have against the original payee. Cases distinguished. Ib.

7. SAME: CONSIDERATION. A check without consideration, the original object of its drawing having failed, should be returned to the drawer, and this applies to a belated indorsee. Ib.

BENEFIT SOCIETIES.

1. REINSTATEMENT OF LAPSED MEMBER: MEDICAL BOARD V. MEDICAL DIRECTOR. Under the by-laws of defendant society the medical director acquires no right to pass upon the application of a lapsed member for reinstatement unless the medical board is not satisfied with such application or more than ninety days shall have elapsed since the applicant defaulted in his premiums. Dickey v. Life Assn., 372.

2. REPUDIATED POLICY: RECOVERY OF PREMIUMS. Where a benefit society abandons its contract by wrongfully refusing reinstatement and declaring the policy forfeited, the member can treat the contract as at an end and recover his premiums with interest. Ib.

3. PETITION: AVERMENTS: PRAYER. If the petition contains the necessary allegations to recover premiums paid on a repudiated policy, the fact of an improper prayer will not prevent a judgment which is fully sustained by the matters alleged. Ib.

4. REINSTATEMENT OF LAPSED MEMBER: MANDAMUS: ELECTION. Though mandamus may be a remedy for the reinstatement of a lapsed member, yet he can elect to maintain an action for his premiums. Ib.

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BREACH OF PROMISE. See EVIDENCE, 3; MARRIAGE, 1.

BROKERS. See EVIDENCE, 5, 6.

1. REAL ESTATE: DUAL AGENCY: COMMISSIONS. A real estate broker who, without the consent of the parties, represents both vendor and vendee, can not recover commissions for the sale. Rosenthal v. Drake, 358.

2. SAME: JURY QUESTION: INSTRUCTION: APPELLATE PRACTICE. Whether the broker is the agent of both parties is a question for the jury, and when submitted on proper instruction and evidence the appellate court can not disturb the verdict. Ib.

3. AMOUNT OF COMMISSIONS: JURY QUESTION: INSTRUCTION. Where the question of the amount of the broker's commissions is submitted to the jury on proper instruction, the finding is conclusive. Ib.

BURDEN OF PROOF. See BANKS AND BANKING, 4; NOTICE, 8; RAILROADS, 8.

CHATTEL MORTAGES. See CREDITOR'S BILL, 4.

1. CONDITIONAL SALE: CONSTRUCTION: REPLEVIN. The law does not favor conditional sales and in doubtful cases the courts incline to favor mortgages. The instrument set out in the opinion is held to be a mortgage of indemnity and not a conditional or absolute sale, and upon condition broken plaintiff was entitled to possession of the property and to maintain replevin therefor. Turner v. Brown, 30.

2. REDEMPTION: FORECLOSURE. Under the instrument in suit after condition broken, the mortgagor had the right of redemption until foreclosure by paying the money secured and the damages resulting from the broken condition; but on his failure to redeem, the mortgagee could hold the property subject to the sale and indemnify himself out of the proceeds. Ib.

CHASTITY. See MARRIAGE, 1.

CHECKS. See BANKS AND BANKING, 5, 6, 7, 8, 9, 10; BILLS AND NOTES, 3, 4, 5, 6, 7.

COLLECTION. See BANKS AND BANKING, 5, 6, 7, 8, 9.

COLLUSION. See INTERPLEADER, 1; TRUSTS AND TRUSTEE, 1.

COMMISSIONS. See BROKERS, 1, 2, 3; GUARDIAN AND CURATOR, 5, 10.

COMMON CARRIERS.

1. NEGLIGENCE: SHIPPING CATTLE: INSTRUCTIONS: VERDICT. Where there is evidence of negligence in the shipment of certain stock, and the evidence tends to support the allegation with no contributory negligence pleaded, and the case is fairly submitted on the issue of negligence, the verdict is binding. Minter v. Railroad, 130.

2. SHIPPING CATTLE: CONTRACT AGAINST HEAT: NEGLIGENCE. A carrier of cattle can not exempt himself by a contract from liability for their overheating occasioned by his negligence. Ib.

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3. EVIDENCE: AGENCY. The shipper of cattle who shows that a certain person at a station on the line of the railroad had charge of all incoming and outgoing trains at that point and always controlled their movements, makes a *prima facie* case of such person's agency and authority to bind the carrier and shifts the burden upon the carrier to show the contrary. Ib.

4. PASSENGER CARRIERS: ACTION FOR ABUSE OF PASSENGER: EVIDENCE: APPELLATE PRACTICE. The evidence in support of an action for damages by a passenger arising out of his abuse by a co-passenger, is reviewed; and while it is probably insufficient to support a verdict for the plaintiff, yet the verdict can not be set aside in the appellate court on that ground since no such complaint appears in the motion for a new trial. Edward v. Railway, 478.

COMMON LAW. See COSTS, 2; NOTICE, 2; TRESPASS, 1.

COMPROMISE.

1. PRESUMPTION OF LAW: REOPENING OF LITIGATION. To prevent litigation the law favors settlements of differences and presumes that a deliberate settlement and payment and receipt of the money found due, embraces every element entering into the disputed contract and that the settlement was intended as a finality; and an attempt to relitigate such matters is vexatious and contrary to sound policy. Marshall v. Larkin's Sons, 635.

2. CONSIDERATION: ACCORD AND SATISFACTION. The existence of a *bona fide* controversy as to facts with mutual concessions in compromise furnish a sufficient consideration for a new agreement; and in this case such new agreement may be viewed as an accord and satisfaction and binding, because the accord was executed. Ib.

CONSIDERATION. See BILLS AND NOTES, 7; COMPROMISE, 2; CONTRACTS, 1, 2; INSURANCE, 9, 20; PARTIES, 1.

CONSTRUCTION. See CHATTEL MORTGAGE, 1; CONTRACTS, 9; COSTS, 1, 2, 3; INSURANCE, 5, 13; JUSTICES' COURTS, 4, 5, 6; MORTGAGES, 1; TAXES, 2; WILLS, 1, 2.

1. CONTRACT: SPECIFIED SERVICES: CONSIDERATION: APPORTIONABLE CONTRACT: COMPENSATION. A deep rooted principle of common law is that when parties have entered into a contract by which the amount to be performed by one and the consideration to be paid by the other are made certain and fixed, the contract can not be apportioned. But where the services to be performed are specified and fixed, but the consideration to be paid is left to be implied by law, the contract may be apportionable, provided the nature of the contract is such that the accrual of the benefits go along and keep pace with the performance and are not dependent upon a completion of the contract in its entirety. Wagner v. Edison, etc., Co., 287.

2. SAME. Where benefits accrue as they did in this case as the work progresses, it may be well presumed that the parties, contemplated remuneration should be paid from time to time during the progress of construction, especially may this presumption be indulged in view of the fact that the contract provided for monthly payments to the contractor on estimates to be made by respondent. Ib.

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3. SAME. In the case at bar, it is held that the contract is apportionable, and that the suit is not prematurely brought. Ib.

4. INSTRUCTION. Instruction in the case at bar examined and held to properly submit the sole question of fact to the jury. Ib.

CONTEMPT. See PROHIBITION, 1.

CONTRACTS. See COMPROMISE, 1, 2; CONSTRUCTION, 1, 2, 3; JUSTICES' COURTS, 2, 10; MASTER AND SERVANT, 4; MUNICIPAL CORPORATIONS, 5, 6, 7, 8, 9, 10, 11; PARTIES, 1; PLEADING, 1.

1. THIRD PERSON: INDEMNITY. A stipulation in a lease by which the lessee agrees to indemnify the lessor against his past acts and omissions, etc., will not sustain an action by a third person against such lessee for the defaults of the lessor, since it is not a contract for the benefit of such third person. Hill v. Railroad, 188.

2. CONSIDERATION: ACTION. A benefit passing to the promisor from the promisee will sustain a contract; and where a lessee of a railroad promised if a party would wait the lessee would pay the damages done his stock by the lessor and the party did wait, the waiting was a sufficient consideration to support the contract and the promisee may maintain an action thereon. Ib.

3. TRESPASS ON CASE: VOLUNTARY UNDERTAKING: BINDING. Appellant wishing to do some excavating on his lot, wrote respondent, the owner of an adjoining lot, upon which was a building, notifying him to provide lateral support for a portion of the wall of his building, saying that he would leave sufficient earth to protect the other part of the wall. But the amount of earth left proved insufficient along that part of the wall which respondent agreed to protect. Held, that respondent had a right to rely on the promises of appellant though voluntarily given. Delaney v. Bowman, 252.

4. EVIDENCE: JURY QUESTION. On the evidence introduced in the record it was for the jury to say whether there was a contract between the parties and whether there was no compliance therewith by the defendant. Shoemaker v. Crawford, 487.

5. CROPPER: BREACH: MEASURE OF DAMAGES. The measure of damages for a breach of contract to furnish a cropper so much land to be cultivated on the shares is such injury as follows in the natural course of things and is reasonably supposed to have been in the contemplation of the parties as the probable result of the breach. Ib.

6. SAME: EVIDENCE: DAMAGES. The damages for the breach of an agreement to furnish land to be cultivated on the shares should be ascertained by proving the value of the right to so cultivate the land; and the opinions of experienced farmers is competent. Such opinions can be sifted on cross-examination. Ib.

7. SAME. Juries are allowed to act upon probable and inferential as well as direct and positive proof; and in an action for damages for a breach of contract between the cropper and landowner, it is competent to show the quality of the crop that was in fact raised on the land during the time covered by the contract. Ib.

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8. SAME: DAMAGES: POSSESSION. In an action to recover damages for the breach of a contract between a cropper and a landowner, it is immaterial whether or not the cropper entered and was ejected by the landowner. Ib.

9. CONSTRUCTION OF: LANDLORD AND TENANT. Defendants in writing agreed to ship certain wheat raised by plaintiff's tenant and to hold the money until rent had been satisfied. In several ineffective proceedings against the tenant to recover the rent, plaintiff garnished the defendants. *Held*, the true meaning of the instrument is that the money was to be held by the defendants instead of the wheat on which the landlord had a lien for his rent, and the plaintiff so construed it by his garnishment of the defendants in his former suits. Hopper v. Hays, 494.

10. LATTER SUPERSEDING FORMER: QUESTION FOR THE COURT. A receipt for a partial payment on real estate not enforcible by reason of its failure to describe the property is superseded by a latter contract fully describing the property and formal in every regard, and the interpretation of such contract is for the court and not for the jury. McClurg v. Whitney, 625.

11. RESCISSION: ACTION. If a settlement of a controversy growing out of a former contract is regarded as a mere rescission thereof, no action can thereafter be based on said former contract, as the rescission treminated the same and all future relations are measured by the new contract on which alone suit can be brought. Marshall v. Larkin's Sons, 635.

COMMISSION.

1. LANDLORD AND TENANT: MISAPPLICATION OF RENT MONEY. Where defendants holding money to secure the rent apply the same on the debt due them from the tenant, they thereby convert the landlord's security and are liable in damages therefor. Hopper v. Hays, 494.

2. LIMITATION. A conversion occurred January 16, 1894, and suit brought April 15, 1898, was in good time even if the five years' limitation and not the ten years' applied. Ib.

CORNER STONE. See CRIMINAL LAW, 4.

CORPORATIONS. See BANKS AND BANKING, 1, 2; JUDGMENTS, 5; PARTITION, 1.

CORRECTION. See FRAUDULENT CONVEYANCES, 1, 2, 3.

CONTINUANCE. See PRACTICE, APPELLATE, 1.

COSTS.

1. APPELLATE PRACTICE: PRINTING ABSTRACT. An appellant on a reversal of the judgment below, where the appeal is on the short method, is entitled to the costs of printing the abstract when it conforms to the rules of the court. Baldwin v. Boulware, 322.

2. COMMON LAW: STATUTE: CONSTRUCTION. The right to recover costs does not exist at common law but by statute alone, and such statute must be strictly construed. Ib.

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3. STENOGRAPHER'S FEES: STATUTE: COUNTIES OF 45,000. The statute providing for stenographers in counties of 45,000 inhabitants and less makes only two provisions for taxing costs relating to stenographers, to wit: Two dollars for each case tried and five cents per one hundred words allowed the clerk for the transcript furnished him by the stenographer in cases of appeal, and an appellant can not recover fees paid the stenographer for a transcript, and such fees can not be charged up as costs of suit. Ib.

COTENANCY. See PARTITION, 1, 2, 3.

COUNTY CLERK. See SCHOOLS, 2.

CREDITOR'S BILL.

1. JUDGMENT CREDITOR: GENERAL CREDITOR. A court of equity is not ordinarily the forum for litigating disputed claims, and a creditor must reduce his claim to a judgment before appeal to a court of equity to enforce its collection. Burnham, Munger & Co. v. Smith, 35.

2. SAME. But where the debtors are insolvent and their only property consists of an equity of redemption of certain chattels in the hands of a mortgagee which can not be reached by attachment, execution or garnishment, and the creditor's claim is in effect undisputed, a court of equity will entertain a creditor's bill to subject the surplus in the mortgagee's hands to the payment of a debt on equitable principles. Ib.

3. LIS PENDENS: LIEN. The filing of a creditor's bill creates no lien on the debtor's equitable assets by reason of the *lis pendens*. Ib.

4. SAME: MORTGAGE: GENERAL CREDITORS: MARSHALING ASSETS. A mortgage delivered after service of subpoena in a creditor's bill is ineffective to change the grantor's interest in the property which is the subject of the suit; and the grantees in such mortgage are no more than general creditors; and on a marshaling of the assets, take *pari passu* with the other general creditors. Ib.

CRIMINAL LAW.

1. SELLING LIQUOR: MERCHANTS' LICENSE: DEFENSE. A license applied for in October with bond filed but not issued until the May following will not protect the applicant on an indictment for sale of liquor made between said dates without dramshop keeper's license. The license must be secured before the sale. State v. Totman, 56.

2. SAME: SUFFICIENCY OF INDICTMENT: PLEA OF GUILTY. An indictment for selling liquor which charges that the defendant being then and there a merchant, etc., sufficiently charges that he was indicted as a merchant. It is not required to set out the facts constituting him a merchant, especially where he pleads guilty as charged in the indictment. State v. Shafer, 58.

3. PROCEDURE: FORMER CONVICTION: SUBMISSION TO THE COURT. On a trial of an indictment for a misdemeanor under the statute, the trial court has authority to try a plea of former conviction without the aid of a jury when the parties agree thereto, and the proceedings of the court will be presumed to be regular even where the record is silent as to the waiver. State v. Wiley, 61.

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4. REMOVING CORNER STONE: WILLFULLY EQUALS KNOWINGLY. In the statute relating to removing of corner stones willfully means knowingly, that is, with wrongful intent, not merely intentionally. State v. Ferguson, 583.

CROPPER. See CONTRACTS, 5, 6, 7, 8; LANDLORD AND TENANT, 1.

DAMAGES. See ASSAULT AND BATTERY, 1, 2, 3, 4; CONTRACTS, 6, 7, 8; EVIDENCE, 5; INJUNCTION, 1; LANDLORD AND TENANT, 1; MARRIAGE, 1; MASTER AND SERVANT, 6; PRACTICE, TRIAL, 7; RAILROADS, 9; SALES, 2; TRESPASS, 1.

1. PERSONAL INJURY: MEASURE OF DAMAGES: ELEMENTS OF: INSTRUCTION. An instruction on the measure of damages properly mentioned the bodily pain and mental anguish, loss of time and expense, without giving to the jury license to add to these any so-called general damages. Cohen v. Railroad, 180.

2. DAMAGES: EXCESSIVE. On the facts of this case a verdict of $2,000 is not excessive. Ib.

3. PERSONAL INJURY: INADEQUATE VERDICT: NEW TRIAL. In personal actions founded in tort and sounding merely in damages, a new trial will not be granted on the sole ground of the smallness of the damages. Exceptions to the rule noted. Edwards v. Railway, 478.

4. SAME: MEASURE OF DAMAGES: INSTRUCTION: PETITION. Under the petition in this cause an instruction on the measure of damages allowing the recovery for mental and physical pain suffered and to be suffered, for permanent injury and for all damages, present and future, the necessary result, of the injury, was proper. Hansberger v. Railway, 566.

5. INSTRUCTION: DUTY OF DEFENDANT. If plaintiff's instruction relating to the measure of damages is general and indefinite, the defendant should ask an instruction limiting and particularizing the elements, otherwise he can not object to plaintiff's instruction. Wood v. Kelly, 598.

DEBTOR AND CREDITOR. See ADMINISTRATION, 6, 7, 8, 9, 10; ATTACHMENT, 1, 2; CREDITOR'S BILL, 1, 2, 3, 4; FRAUDULENT CONVEYANCES, 1, 2, 3; SALES, 1.

DECEIT.

EQUITY: FRUITS OF BARGAIN. Deceit rests upon fraudulent motive, but it is against good conscience that a party keep the fruits of a bargain obtained by his representation which turns out to be false; and, on the evidence and pleadings in this record, it stands admitted that the representation as to title of certain land was false. Culver v. Smith, 390.

DECREE. See INJUNCTION, 1; JUDGMENT.

DEEDS. See FORCIBLE ENTRY AND DETAINER, 3; NOTICE, 3, 4, 8.

DEFENSE. See BANKS AND BANKING, 6, 7, 8; CRIMINAL LAW, 1.

DESCRIPTION. See FORCIBLE ENTRY AND DETAINER, 1, 6; MECHANICS' LIENS, 2.

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DISCHARGE. See BANKS AND BANKING, 9; MASTER AND SERVANT, 4, 5, 6.

DIVORCE. See HABEAS CORPUS, 1.

1. ABANDONMENT: PLEADING: EVIDENCE. The petition in this case sufficiently alleges abandonment, which the answer admits, but the evidence fails to sustain the allegations of the answer in regard to support and maintenance. Van Horn v. Van Horn, 79.

2. INDIGNITIES. The defendant's evidence on the question of indignities in this case is held insufficient. Ib.

3. IGNORANCE: CRUEL TREATMENT: EVIDENCE. The evidence in this case is reviewed and found to authorize the wife to a divorce with alimony. Strahorn v. Strahorn, 580.

4. DIVORCE: ADULTERY CONNIVED AT: NO DIVORCE: BILL DISMISSED. Respondent hired as a detective, one White, alias Morgan, to furnish him ocular proof of his wife's infidelity. White planned an assignation between himself and respondent's wife, appellant herein, at a certain place and time, and notified respondent that he could in an adjoining room by means of openings in the partition see her commit the act of adultery; he attended, saw and was satisfied. *Held*, under the circumstances, respondent was consenting to the act of which he complained within the meaning of section 4507, Revised Statutes 1889, and ruled against his having a divorce, reversed the cause, and ordered his bill dismissed. Torlotting v. Torlotting, 192.

5. FINDING OF LOWER COURT: NOT CONCLUSIVE. The appellate court will examine the evidence in a divorce suit, for itself, and reach its own conclusions, yet when the testimony is oral and conflicting, much deference will be given to the findings of facts by the trial court. Ib.

6. CLEAN HANDS: INNOCENT. A party seeking a divorce must, as in a court of equity, come into court with clean hands, he must be both an injured and innocent party. Ib.

7. SAME: PRINCIPAL BOUND BY AGENT. White was respondent's agent, he was hired, not restricted as to the means to employ to compass his object, and was expected to furnish the wanted evidence, which circumstance, under the law of agency, places respondent in the unequivocal attitude of conniving and consenting to his wife's adulterous act. Ib.

8. SAME: DISCOVERY. The husband may employ agents to watch his wife for the purpose of discovering whether she is guilty or not, as suspected, and he is only required to permit his wife to proceed far enough in the commission of the act to discover to a certainty her lewd disposition. Ib.

DOMICILE. See ADMINISTRATION, 5.

DOWER. See ADMINISTRATION, 5.

DRAMSHOPS. See CRIMINAL LAW, 1.

EJECTMENT. See INJUNTION, 4.

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ELECTIONS.

1. CONSTRUCTION ACT MARCH 5, 1897: NOMINATING CANDIDATES BY PRIMARY. Under section 4796g, of Act, approved March 5, 1897, any twenty qualified voters of a ward, members of the political party ordering a primary election, may by petition in writing and on deposit of ten dollars with the board of election commissioners, have placed on the ballots for the primary, the names of delegates to be voted for at such election. Johnson v. Jones, 204.

2. SAME: BUT ONE SET OF DELEGATES. Can twenty qualified voters of the party calling the convention nominate a delegation to-day, and to-morrow can twenty other qualified voters of the same party, precinct and ward, nominate a delegation in the same manner, the same persons being on each delegation, and must the board of election commissioners recognize both nominations and give each the privilege of presenting the names of five persons from whom the board must select judges and clerks of the election? *Held*, under the Act of 1897, that when the first petition was presented and the necessary deposit made, and the delegation mentioned therein was recognized by the board of election commissioners, such delegation was duly nominated, and each member thereof lawfully entitled to have his name printed on the ballots to be voted for at the primary and no further additional petition seeking to nominate an "Independent Delegation" could better or make more complete the first petition, and nothing by the second petition was added whatever to the first, it being a nullity. Ib.

3. INJUNCTION. A temporary writ of injunction issued by the lower court enjoining the election commissioners from recognizing the "Independent Delegation" under the pleadings and agreed statement of facts submitted by the parties to the court, was properly issued and its judgment with respect thereto is accordingly affirmed. Ib.

EMBEZZLEMENT. See ADMINISTRATION, 6.

ESTOPPEL. See FRAUDULENT CONVEYANCES, 4; PARTITION, 1; SALES, 3; WILLS, 1, 2.

EXECUTOR'S PAYMENT OF NOTES AT THE REQUEST OF THE PRINCIPAL: ALLOWANCE. One can not repudiate a state of things brought about by his own instigation and request; so where an executor at the request of the principal pays a note on which his testator was surety, such principal can not escape indemnifying on the ground that said note had not been presented to and allowed by the probate court. Ratcliff v. Lumpee, 335.

EVIDENCE. See AGISTMENT, 1; COMMON CARRIERS, 3; DIVORCE, 1; HOMESTEAD, 2; MASTER AND SERVANT, 3; NEGLIGENCE, 9; NOTICE, 8; PLEADINGS, 2; RAILROADS, 8; TITLE, 1; TRESPASS, 3.

1. WHISTLING AT CROSSING: ORDINANCE: CONTRIBUTORY NEGLIGENCE. The plaintiff, injured by a train at a street crossing, may testify that no whistle was sounded, though there was no ordinance or statute requiring whistling. It constitutes part of the *res gestae* and bears on the question of contributory negligence. Covell v. Railroad, 180.

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2. Speed of train: expert: res gestae. A plaintiff who was injured at a crossing may testify to the speed of the train as a part of the *res gestae* without being an expert. Ib.

3. Breach of promise: general reputation: limiting witnesses. A rule limiting the number of witnesses on a given point should be announced before the trial that the parties may select their important witnesses; and in an action of breach of promise, limiting defendant to three witnesses on the general reputation of the plaintiff —two of whom are plaintiff's witnesses and testify on cross-examination—without announcing such ruling before the question is gone into, is not a sound exercise of the discretion of the trial court to limit the number of witnesses. Markham v. Herrick, 327.

4. Material fact: hearsay. Though a fact within the knowledge of a witness may in itself be material, it will not authorize the introduction of a mass of hearsay intermingled with it in the same answer and the whole should be ruled out together. Howard v. Shoe Co., 405.

5. Personal injury: average earnings: damages. In a personal injury case the average earnings of the defendant where he has no fixed salary, are proper to go to the jury on the extent of his loss. Paul v. Railway, 500.

6. Broker: holding proceeds of sale: fraud: pleading. In an action against a commission merchant for retaining a portion of proceeds of sales it is not necessary to allege or show a fraudulent intent it is sufficient to show the act itself though it is well enough to allege and show fraud, if it exists, but it is error to admit evidence of other independent transactions to establish the fact of the retention or to show it was fraudulent. Tracy v. McKinney, 506.

7. Fraud: other transactions: intent. Where intent is an element in the cause of action, evidence of collateral transactions is only received to characterize the act charged, but such evidence can never prove the act charged which must be shown *aliunde*. Ib.

8. Latter contract superseding former: parol testimony. A writing complete and perfect in itself and unambiguous will supersede a prior written contract relating to the same subject-matter, and parol evidence will not be admitted to show that such was not the intention of the parties. McClurg v. Whitney, 625.

EXECUTIONS.

Quashing: garnishment: exemption. The fact that the defendant in a judgment has allowed a garnishment judgment to be entered against him after the constable had been notified that the plaintiff in the judgment claimed that it was exempt, affords no ground for quashing an execution on the judgment or questioning its assignment. Day v. Burnham, 538.

EXEMPTIONS. See Executions, 1; Garnishment, 6; Judgments, 6.

FEES. See Costs, 1, 2, 3; Injunction, 3; Jurisdiction, 4; Offices and Officers, 1.

FENCES AND INCLOSURES. See Railroads, 4, 7, 10.

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FIDUCIARY RELATIONS. See GIFTS, 2.

FORCIBLE ENTRY AND DETAINER.

1. DESCRIPTION. A description in an action of forcible entry and detainer by which the premises can be accurately located, is sufficient, and great strictness and accuracy are not essential. Naylor v. Chinn, 160.

2. COMPLAINT: VERIFICATION: WAIVER. The verification of a complaint in an action of forcible entry and detainer is held sufficient; beside, any defect was waived by a failure to object in the trial court. Ib.

3. EVIDENCE: BOUNDARIES OF LAND: DEED. What are the boundaries of land conveyed by a deed, is a question of law; where are the boundaries, is a question of fact; and in an action of forcible entry and detainer it is not common error to refuse the admission of a deed that has nothing to do with the land in dispute. Ib.

4. INSTRUCTIONS. Instructions, though unnecessarily numerous and lengthy, fairly submit the case to the jury. Ib.

5. JURY: MOTION IN ARREST. The motion in arrest is necessary to raise the question that the jury consisted of six instead of twelve men where the appellant takes no exception during a trial. Ib.

6. JUDGMENT: DESCRIPTION. A judgment in forcible entry and detainer should describe the land. Ib.

7. PARTY IN POSSESSION: TENANT. Forcible entry and detainer will not lie against the landlord when his tenant is in possession at the institution of the suit. Jennings v. Robinson, 544.

FORMER CONVICTION. See CRIMINAL LAW, 3.

FRAUD. See EVIDENCE, 5, 6; SALES, 1.

FRAUDULENT CONVEYANCES. See ATTACHMENTS, 1, 2.

1. USURY: SUBSEQUENT CORRECTION. Although the debt secured by a mortgage be usurious and therefore invalidating the mortgage, yet the parties may repudiate such usury and correct the mistake by proper agreement. Peters Shoe Co. v. Arnold, 1.

2. FICTITIOUS DEBT: SUBSEQUENT CORRECTION. Where there is a fictitious element in a debt secured by a mortgage, the parties thereto may, prior to the intervening rights of creditors by a subsequent agreement purge the action of such fraud. Ib.

3. BUYING DEBTS OF GRANTOR: CREDITOR'S SPECIFIC RIGHT: EQUITY. The fact that the mortgagee with the proceeds of sale bought other debts of the mortgagor prior to an unsecured creditor's obtaining judgment, will not render the mortgage fraudulent since no creditor can be delayed until he has a specific right to satisfaction out of property withdrawn from his reach, and, until such event, equity can not interfere as the creditor still has his remedy at law. Ib.

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4. UNRECORDED MORTGAGE: CONTINUING BUSINESS: ESTOPPEL. Where a mortgagee withholds his mortgage from record and permits the mortgagor to carry on business with the mortgaged goods in the usual course, such mortgage is void as to subsequent creditors and the mortgagee is estopped from setting it up. Lowrance v. Barker, 125.

5. PLACE OF REPENTANCE: ABANDONMENT OF FRAUD. Before a fraud-feasor can plead his repentance so as to hold under a subsequent title, he must abandon the fraud and base his whole claim on the *bona fide* transaction. Ib.

7. CHANGE OF POSSESSION: WHISKY IN BOND. A sale of whisky in bond by the owner on an order for it which is made known to the officer in the immediate possession, is a sufficient change of possession, especially when followed by an actual turning over by the officer to the vendee. Wachtel v. Ewing, 594.

8. ATTEMPT TO HINDER: PRACTICE. Where the question of fraud with intent to hinder creditors is submitted to the jury upon instructions asked by each party, the verdict is conclusive upon the appellate court. Ib.

9. EXISTING ATTACHMENT: KNOWLEDGE OF VENDEE. The fact that an attachment writ was out against the vendee's property generally, will not affect the validity of the purchase unless the vendee knows thereof, especially where such writ had been returned at the time of purchase. Ib.

10. ABANDONED ATTACHMENT LEVY. The fact that a levy has been attempted under an attachment writ and abandoned and the writ returned will not vitiate a sale otherwise valid. Ib.

GARNISHMENT. See ATTACHMENT, 1; EXECUTIONS, 1; JUSTICES' COURTS, 9.

1. PLEADING: PETITION: DENIAL. In garnishment the denial of the answer by the plaintiff stands in the place of the petition in an ordinary action and no issues are raised by the interrogatories and answer. Hax v. Plaster Co., 447.

2. SAME: ADMISSION: ASSIGNMENT. Where a denial admits an assignment and assails its validity on the ground of fraud, the issue is whether the assignment was fraudulent, and the burden of proof is on the plaintiff; and if there is no evidence controverting the answer of the garnishee, it is conclusive; and in this case an assignment is held valid and free from fraud. Ib.

3. WAGES: ASSIGNMENT OF: PUBLIC POLICY. An assignment of wages to be earned under an existing contract of employment made in good faith and for valuable consideration is valid, and it is immaterial that the assignor works from day to day and for no specified time. Ib.

4. SAME: EQUITY: EXPECTANCY. In equity an assignment of wages that are mere expectancy or possibility is valid as an agreement to assign; and when such wages are earned and in fact paid to the assignee, the transaction is valid and binding. Ib.

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5. SAME: ACCEPTANCE: CONTINUANCE: GARNISHMENT. An assignment "of all claims and demands which I now have and which I may have at any time between the date hereof and July, 1899," which is accepted by the employer of the asignor without reference to any particular contract, attaches to all the earnings of the assignor during his continuous service for the employer; and the assignor's creditors stand in his shoes and have no greater rights to the assigned wages than he, and the service of garnishment on the employer did not suspend the assignee's right to the assigned wages. Ib.

6. EXEMPTIONS: CLAIM. A debt due by one person to another is primarily subject to seizure under a constable's execution; but its selection as exempt under section 4905, Revised Statutes, 1889, exempts it as much as if it had been designated by section 4903 as specially exempt. Day v. Burnham, 538.

GIFTS.

1. SOUND MIND: EVIDENCE. The evidence in this case fails to show that the donor of a certain check was of feeble and unsound mind, although he was crippled, aged and physically enfeebled. Reed v. Carroll, 102.

2. FIDUCIARY RELATIONS: PRESUMPTION: PRINCIPAL AND AGENT. Where a fiduciary relation exists between the donor and donee, the law scrutinizes with jealousy a gift from the former to the latter and such transaction is presumptively void and the burden is on the donee to show its absolute fairness both at law and in equity; and in transactions between principal and agent this rule applies in this state. Ib.

3. UNDUE INFLUENCE: EVIDENCE. Evidence attending to the giving of a check from a principal to his agent is reviewed and the transaction is found to be free from the taint of covinous influence and the presumption of undue influence is fully rebutted and overcome. Ib.

GLASGOW. See TAXES, 1.

GUARDIAN AND CURATOR.

1. ALLOWANCE FOR INTEREST ON BORROWED MONEY: ANNUAL SETTLEMENTS: IMPEACHING TESTIMONY. Where a ward's estate is subject to fixed charges and there are no funds in hand to pay the same when they become due and the curator borrows money to discharge them and receives credit for interest on such borrowed money in his annual settlements, such settlements are *prima facie* correct and will be so held in the absence of impeaching testimony. State ex rel. v. Elliott, 458.

2. SAME: WARD'S ESTATE IN TWO STATES. Where a ward has an estate in both Missouri and Kentucky and it is necessary to protect his estate that money be borrowed, the fact that the curator transfers the proceeds of the Missouri estate to meet the necessities of the Kentucky estate will not defeat his right to credit for interest on money borrowed to protect the former estate. Ib.

3. ILLEGAL TAX: PENALTIES: CREDIT FOR. Where a curator pays an illegal tax and penalties accrued thereon and receives credit therefor in his settlement, in the absence of impeaching testimony he is entitled to such credit on final settlement, especially where the estate is shown to be without money in hand at all times to pay its fixed charges. Ib.

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4. ATTORNEY'S FEE: FAILURE TO DISCHARGE DUTY. Where a curator has discharged all his duties he is entitled to a reasonable attorney's fee in defending his settlements; but if he has not so discharged his duties, he is not entitled to such allowance. Ib.

5. TRANSFER OF FUNDS: COMMISSIONS. Though a transfer of funds of the ward from one state to another may not be in strict conformity with the law and under direction of the probate court, yet, where the money is actually applied to preserve the ward's estate and is reported to the probate court and allowed in the annual settlement, an allowance of five per cent commissions can not be held to be illegal. Ib.

6. TRAVELING EXPENSES OF APPOINTMENT: PAYMENT TO AGENT. A curator residing in another state is not entitled to a credit for his expenses in coming to this state to qualify, but a payment which is allowed in his first settlement for services of an agent is *prima facie* correct and will be allowed in the absence of impeaching testimony. Ib.

7. PAYMENTS TO STEWARD. A nonresident curator may be entitled to the services of a steward in the management of a large farm belonging to his ward in this state, and the rule, to determine the compensation of such steward is not necessarily fixed by the fact that others near the estate would have done the work for a less sum with less expense, especially where such steward has increased the productive capacity of the farm and secured handsome returns. Ib.

8. UNPLEADED ITEM. In an action on a curator's bond he will not be allowed a credit which is not pleaded in his answer and is without any evidence to support it. Ib.

9. ROAD TAX: PAYMENT TO WRONG OFFICER. The fact that a guardian paid a road tax to a wrong officer will not of itself defeat his right to a credit therefor. Ib.

10. COMMISSION ON PAYMENT TO WIDOW. A guardian and curator is not entitled to commissions on an amount paid the widow of the ward's father for her part of the rent of land subject to her dower. Ib.

11. ACTION ON BOND. On the record in this case it is held that relator's action was properly sustained and a modified judgment is entered. Ib.

HABEAS CORPUS.

JURISDICTION: DIVORCE PROCEEDING: CUSTODY OF CHILD. A court granting a divorce has a continuing jurisdiction over the custody of the children of the parties subject to be invoked at any time and other courts will not interfere by writ of *habeas corpus*. In re Kohl, 442.

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HOMESTEAD.

1. JUDGMENT LIEN: MISSOURI DOCTRINE. In Missouri the lien of a judgment does not attach to the homestead of the judgment debtor though it may be otherwise in other jurisdictions. Rogers v. Bank, 377.

2. CLOUD UPON TITLE: GRANTEE OF HOMESTEAD: JUDGMENT LIEN: PAROL EVIDENCE. The grantee of a homestead by deed with condition subsequent can maintain a bill to remove from his title a cloud cast by transcript judgments of a justice against his grantor filed in the circuit clerk's office when it would require parol evidence to show the invalidity of such lien. Ib.

INDICTMENT. See CRIMINAL LAW, 2..

INFANTS. See NEGLIGENCE, 1.

INNOCENT PURCHASER. See NOTICE, 8.

IMITATION. See NEGLIGENCE, 1.

INJUNCTION. See ELECTIONS, 3; TAXES, 3.

1. DAMAGES ON BOND: FINAL DECREE. Damages arising from a temporary injunction can not be assessed until a liability has arisen on the bond, and this can not arise before a final decree, but a dismissal of the petition after the dissolution without a final hearing fixes the liability. Baking Powder Co. v. Baking Powder Co., 19.

2. SAME: WAIVER. Where the motion to assess damages is filed before the dismissal or final hearing and the plaintiff appears to the motion and without objection tries the damages and makes no complaint of prematureness, in his motion for a new trial, he waives the same. Ib.

3. SAME: INSUFFICIENT PETITION: WITNESS FEES. Where defendant secures the dissolution of an injunction because of the insufficiency of the petition, he is entitled to attorneys' fees as damages but not the fees and expenses of witnesses attending for the purpose only of securing the dissolution. Ib.

4. LAND TITLE: EJECTMENT: ACTION. An injunction will not lie as an original proceeding to try the title of land and mines thereunder though it may be resorted to as an auxiliary remedy to ejectment which is the proper action. Graham v. Womack, 618.

5. POSSESSION: INSOLVENCY: TRESPASS. Where the landlord has clear right to the possession and is insolvent and threatening irreparable injury, his trespass may be restrained; and much more so where plaintiff is in possession, whether defendant is insolvent or solvent. Ib.

INQUIRY. See NOTICE, 3, 4.

INSTRUCTIONS. See ASSAULT AND BATTERY, 1, 2; ATTORNEYS AND CLIENT, 1; BROKERS, 2, 3; COMMON CARRIERS, 1; DAMAGES, 1, 5; FORCIBLE ENTRY AND DETAINER, 4; INSURANCE, 6, 7, 8; MARRIED WOMEN, 2; NEGLIGENCE, 11; PLEADING, 2; PRACTICE, APPELLATE, 3; PRACTICE, TRIAL, 1, 3, 7, 8, 9; PRINCIPAL AND AGENT, 1; RAILROADS, 2, 3, 4, 11, 12; SALES, 2; TELEGRAPHS, 2; TRESPASS, 4.

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INSURANCE.

1. AGENCY: MORTGAGOR AND MORTGAGEE: NOTICE. The fact that a mortgage stipulates that the mortgagor should keep the property insured in some good insurance company to be selected by the mortgagee, and the mortgagee makes such selection, does not constitute the mortgagee the agent of the mortgagor and require him to give notice to the company that additional insurance has been secured when he takes a second mortgage to secure a further loan and directs the insurance for such loan in a different company. Gay v. Guarantee, etc. Ass'n, 76.

2. SAFE: BOOKS: INVENTORY: WAIVER. Under the stipulations of an insurance policy, the insured had an option to keep his books and inventories in a safe in the building or in some other safe place; and the evidence fails to show any waiver of such stipulation before or after the loss as there was nothing done to change the insured's position. Gibson v. Ins. Co., 515.

3. STATUTE: THREE-FOURTHS VALUE: VALUED POLICY. Under the act of 1895 an insurance company is restricted from taking a risk at more than three-fourths of the value of the property insured; but when the value is fixed and the risk taken at a given amount, that sum can not be questioned and the policy is a valued policy for that amount. Ib.

4. SAME: VALUED POLICY: DEPRECIATION. The fact that under the statute the policy is a valued one will not prevent the amount being reduced by depreciation, decay or salvage. Ib.

5. STATUTORY CONSTRUCTION: TOWN MUTUAL. The act of March 21, 1895, only relieves town mutual insurance companies from the operation of the general statute of 1889, and does not affect the act of March 18, 1895. Ib.

6. INSTRUCTION: ISSUE. The issue presented by the pleadings and evidence was whether the defendants as insurance brokers had agreed to keep as well as procure a certain amount of insurance on plaintiff's plant. Plaintiff asked an instruction "that if defendants were the agents of the plaintiff for the purpose of keeping plaintiff insured," etc. These words the court struck out and inserted in lieu thereof, "that if defendant agreed with plaintiff to keep plaintiff insured," etc. Held: The substitution was an improvement and no cause of complaint. Brick Co. v. Hogsett, 546.

7. SAME: INDEFINITE LANGUAGE. An instruction telling the jury "that if defendants agreed with plaintiff to act generally as agents and brokers of plaintiff respecting its insurance," etc., is rightly refused as under the issues it is ambiguous. Ib.

8. PLEADING: EVIDENCE. A count in a petition against an insurance broker is reviewed and held to state a cause of action only for a failure to procure insurance as agreed and is found to be without evidence to support its allegations and the complaint that the trial court erred in refusing by its instructions to submit said count to the jury is without foundation. Ib.

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9. ACCIDENT: CO-ORDINATE INDEMNITIES: RELEASE: BAR TO SECOND ACTION: CONSIDERATION. An accident policy provided alternate indemnities for loss of limb or sight or continued disability. Within thirty days after the accident the insured sent in a claim for continued disability and signed a voucher containing a release of the insurer and a discharge of the policy. Within ninety days as stipulated in the policy he gave notice of loss of entire sight resulting from same accident. Held: The voucher was not a bar to the second claim and would not prevent a recovery as the release was broader than the consideration. Cunningham v. Union, etc. Co., 607.

10. SPLITTING DEMANDS: EXCEPTION TO THE RULE: SCIENTER. An entire claim can not be divided and made the subject of several suits but the rule presupposes knowledge of the constitutent elements of the cause of the action and does not apply where the plaintiff is in unavoidable ignorance of the full extent of the injuries done. Ib.

11. CO-ORDINATE INDEMNITIES: DISCHARGE OF POLICY. Held, *arguendo* that the payment for loss of either an eye or a limb would terminate the policy and render it nugatory as to all other indemnities, but such consequence does not attend payment for disability. Ib.

12. CONSTRUCTION OF POLICY. Where the policy is capable of two earnings that meaning must be applied which is more favorable to the assured, even though it was intended otherwise by the insurer. Ib.

13. ACCIDENT: WARRANTIES: APPLICATION, PART OF POLICY. An application for accident insurance is examined in connection with the policy issued thereon, and held to be a part of said policy and its statement to be warranties, since they were so intended by the parties. Van Cleave v. Union, etc. Co., 668.

14. SAME: CONDITIONAL PAYMENT. A policy of insurance by reference may incorporate the statement of the application into the policy and thereby make the payment by the insurer conditional on the truth of such statements which thereby become warranties instead of representations. Ib.

15. WARRANTIES: REPRESENTATION. A warranty must be literally fulfilled while a representation may be only substanitally complied with and a recovery even had if its falsity is not material to the insurer; but if material its falsity will vitiate the policy. Ib.

16. ACCIDENT: BENEFICIARY WITHOUT INSURABLE INTEREST. One may without fraud insure his own life for the benefit of another not having an insurable interest in his life. Ib.

17. REPRESENTATION: APPLICATION: EVIDENCE: STATUTE. The evidence relating to an application for accident insurance is reviewed and its representation that the beneficiary was the wife of the applicant when in fact she was his mistress, is found to be fraudulent and made with intention to deceive, and section 5849, Revised Statutes 1889, is inapplicable, Ellison and Gill, JJ., holding the statute applicable even though the misrepresentation be a warranty unless it be a willfully fraudulent misrepresentation. Ib.

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18. SOLICITING AGENTS: SECRET INSTRUCTION: REPRESENTATION. While secret instruction to a soliciting agent will not vitiate a policy secured by him and accepted by the company, yet the ignorance of such instructions by the assured will not excuse him from making truthful representation in his application. Ib.

19. ACCIDENT: PROOF OF LOSS: AGREEMENT TO PAY: CONSIDERATION. Though a policy of accident insurance might be avoided by reason of misrepresentation in the application, yet, where after death of the insured full information as to the falsity of such representation is laid before the adjusting officer and he agrees to pay the policy to the assignee of the beneficiary, if he will procure the release of the latter, the insurer becomes liable to pay the same upon the presentation of such release and the consideration for the promise is sufficient. Ib.

20. ADJUSTER: SCOPE OF AGENCY: APPARENT AUTHORITY. Where an assistant adjuster while occupying the office and performing the duties of the chief adjuster of an insurance company, makes a contract agreeing to pay a policy on certain conditions, such agreement is within the apparent scope of his authority and binds the insurer, notwithstanding secret limitations of his authority. Ib.

INTEREST. See WILLS, 1, 2.

INTERPLEA. See BILL OF EXCEPTIONS, 3.

INTERPLEADER. See TRUSTS AND TRUSTEES, 1.

COLLUSION. He who brings about contesting claims upon himself can not maintain a bill of interpleader. Swain v. Bartlett, 642.

JUDGMENT. See ADMINISTRATION, 3; CREDITOR'S BILL, 1, 2; FORCIBLE ENTRY AND DETAINER, 6; HOMESTEAD, 1, 2; INJUNCTION, 1; JUSTICES' COURTS, 8; SCHOOLS, 2.

1. FINAL: DEMURRER: WRIT OF ERROR. To a bill in equity seeking specific enforcement of a contract to give a mortgage, a demurrer was sustained, and the judgment recited that the plaintiff elected to stand on his petition and proceeded to give him judgment on the notes declared on in the petition. The motions for new trial and in arrest struck at the court's action on the demurrer. Held, that the judgment on the demurrer was not a final judgment and that a writ of error would not lie to review such action of the court. Kautsch v. Droste, 412.

2. SAME. If a judgment on a demurrer further decrees that the plaintiff take nothing by his writ, etc., it becomes a final judgment and may be reviewed by appeal or writ of error without motions for new trial or in arrest or bill of exceptions. Ib.

3. SISTER STATE: JURISDICTION. In an action on a judgment of a sister state, jurisdictional questions may be inquired into, though the record recites facts necessary to give jurisdiction. Banister v. Gas Co., 529.

4. JURISDICTION: EVIDENCE. On a review of the evidence and the dealing between the parties it is held that defendant had an agent in Texas and that service was regularly had on it under the law of that state. Ib.

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5. CORPORATION DOING BUSINESS IN TEXAS: PERSONAL SERVICE. Held, that the evidence shows defendant was doing business according to law in the state of Texas at the time service was had on its agent, and that such service warranted a personal judgment against the defendant. Ib.

6. ASSIGNMENT: GARNISHMENT: EXEMPTION: FRAUD. A judgment having been selected as exempt may be subsequently assigned by the plaintiff therein and such assignment is not fraudulent. Day v. Burnham, 538.

7. REMITTITUR. The decree examined and found erroneous in amount and remittitur ordered. Dye v. Bowling, 587.

JURISDICTION. See ACTION, 1; ADMINISTRATION, 8; ATTACHMENT, 4; BILL OF EXCEPTIONS, 3; HABEAS CORPUS, 1; JUDGMENTS, 3, 4, 5; JUSTICES' COURTS, 9; TRESPASS, 4.

1. CRIMINAL COURT ABOLISHED: JURISDICTION IN CIRCUIT COURTS. By section 6, Session Acts of 1895, page 132, the St. Louis Criminal Court is abolished and its jurisdiction is transferred and vested in the St. Louis Circuit Court. State v. Mason, 239.

2. SAME: JURISDICTION, HOW GOVERNED. A court is civil or criminal, or both, according to the character of the causes it has authority or jurisdiction to hear and determine. The name by which it is designated may add to its character, but can not control its powers or jurisdiction. Ib.

3. SAME: ASSIGNMENT OF CASES. When the assignment of cases was made, the circuit judges so assigned took the place of and succeeded to the jurisdiction of the former criminal courts, and are to all intents and purposes criminal courts, with authority to exercise criminal jurisdiction only. Ib.

4. SAME: MANDAMUS. The fees claimed by the sheriff not being allowed by the statute, the approval of the judges thereof were without authority, and the judgment making the writ absolute is hereby reversed. Ib.

5. CHANGE OF VENUE: SUCCESSION OF JUDGE: APPEARANCE. A change of venue was taken from a regular qualified judge. C. was selected to try the cause and presided at a mistrial. Before the next trial the legal successor of the regular judge succeeded to his office before whom the parties without objection appeared and went to trial resulting in a verdict and judgment. Held: the parties are precluded from raising the question of jurisdiction. Tracy v. McKinney, 506.

JURY. See BILLS AND NOTES, 2; BROKERS, 2, 3; CONTRACTS, 4, 10; MASTER AND SERVANT, 1; NEGLIGENCE, 8; PRACTICE, APPELLATE, 19; PRACTICE, TRIAL, 6.

JUSTICES' COURTS.

1. STATEMENT: AMENDMENT ON APPEAL: DEPARTURE: WAIVER. Where a statement is amended in the circuit court on appeal from the justice, and the defendant without objection appears and tries the cause on such statement, he has waived his right to object that such amendment was a departure from the original statement. Meadows v. Railroad, 83.

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2. STATEMENT: CONTRACT: CONDITION PRECEDENT: WAIVED. Suit on a subscription contract to a railway company to pay $1,000 conditioned, that building of road be commenced, and finished at and within certain times, the latter condition not being complied with by company, to maintain suit on such contract necessary to allege in statement, waiver of time by the party subscribing: Held, that the admission of evidence in support of statement that failed to allege an extension of time within which to complete railroad was reversible error. Trust Co. v. Investment Co., 260.

3. SAME. In suits before justices of the peace, it is only necessary that the statement of the cause of action should be sufficient to advise the other party of the claim against him, and to bar a second action therefor. Ib.

4. PLEADING AND PRACTICE: STATUTORY CONSTRUCTION. Where a written order is the basis of an action before a justice of the peace, it should be filed with the justice (sec. 6138, R. S. 1889), and under the terms of the statute no process ought to have issued. Rechnitzer v. Candy Co., 311.

5. PRACTICE, APPELLATE. This omission makes the reversal of the judgment imperative. Ib.

6. SAME: AMENDED STATEMENTS. The Revised Statutes 1889, sec. 6349, only permit essential amendments in the circuit court of statements filed before justices when it shall be made to appear from the statement filed before the justice, that it was "intended" to include the amendment prayed for, and in the case at bar there is nothing in the statement filed in this cause before the justice which indicates any specific allegation necessary to the legal sufficiency of the statement "intended" to be included in such statement. Ib.

7. APPEALS: NOTICE. Notice of appeal signed by J. Henry Baer is insufficient when the judgment is against Henry Baer. Stone v. Baer, 339.

8. JUDGMENT: LIENS: TRANSCRIPT. The transcript of a justice's judgment when filed in the office of the clerk of the circuit court is a lien against the defendant's real estate situated in the county. Rodgers v. Bank, 377.

9. GARNISHMENT: JURISDICTION. A justice in a garnishment proceeding acquires jurisdiction of the debt by reason of the constable's seizure. On the constable's receipt of notice of exemption he should release the seizure and make return thereof, after which the justice is without jurisdiction and the garnishee who allows judgment to go against him is without excuse. Day v. Burnham, 538.

10. AMENDED STATEMENT: PARTIES: JOINT CONTRACT. In a complaint filed before a justice of the peace it was alleged that defendant promised to pay S, G and B a certain sum for macadamizing a public road. The contract which was in writing promised to pay S, G or B said sum. Held, there was a variance since the statement was on a joint contract and the evidence showed a several contract, and the statement could not be amended by striking out G and B and leaving the suit in the name of S. Slaughter v. Davenport, 652.

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11. APPEAL: CHANGING ACTION: PARTIES. On an appeal form a justice's court the action that was tried below must be tried in the circuit court; and striking out two parties plaintiff and leaving a sole plaintiff, where a statement alleges a joint contract, changes the cause of action though new parties plaintiff might be added if necessary to a complete determination of the action. Ib.

KILLING STOCK. See RAILROADS, 1, 4, 5, 6, 7.

LACHES. See PARTNERSHIP, 7.

LANDLORD AND TENANT. See CONTRACTS, 9; CONVERSION, 1; FORCIBLE ENTRY AND DETAINER, 7.

1. POSSESSION OF LEASED PREMISES: MEASURE OF DAMAGES: CROPPER. Where the lessor fails to give possession of the leased premises, the measure of damages is the difference between the actual rental value and the rent reserved. But this rule has no application to a breach of a contract between a cropper and a landowner. Shoemaker v. Crawford, 487.

2. POSSESSION: VOID LEASE: OUSTER. Where tenant's lease has been forfeited but he remains in possession neither the landlord nor his subsequent lessee can forcibly eject him but must resort to legal process to gain possession. Graham v. Womack, 618.

LANDOWNER. See MECHANICS' LIENS, 4; NEGLIGENCE, 1; RAILROADS, 7.

LATERAL SUPPORT. See CONTRACTS, 3; NEGLIGENCE, 10.

LEGACY. See WILLS, 1, 2.

LEVY. See ATTACHMENT, 3; TAXES, 3.

LIENS. See CREDITOR'S BILL, 3.

LIMITATIONS. See CONVERSION, 2; PARTNERSHIP. 6.

LIS PENDENS. See CREDITOR'S BILL, 3, 4; NOTICE, 1.

MANDAMUS. See BENEFIT SOCIETY, 4.

MARRIAGE.

BREACH OF PROMISE: CHASTITY: BAR OR MITIGATION. In an action for breach of promise the character of the plaintiff is material matter, since all promises of this kind are founded upon the presumption of the chastity of the woman; and unchaste conduct, and consequently bad reputation, if not a bar, is proper matter in mitigation of damages. Markham v. Herrick, 327.

MARRIED WOMEN.

1. DAMAGES: ORDINARY AVOCATION: HOUSEHOLD DUTIES. For personal injury to a married woman two causes of action arise, one to her for pain and suffering, etc., the other to the husband for loss of service, etc.; and the husband only can recover for injury disabling the wife from attending to the ordinary avocations of life which, in the absence of other evidence, will be presumed to be household duties. Wallis v. Westport, 522.

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2. INSTRUCTIONS. An istruction permitting a married woman to recover for a permanent disability to perform the ordinary avocations of life is reversible error, especially where the verdict is somewhat excessive. Ib.

MARSHALLING ASSETS. See CREDITOR'S BILL, 4.

MASTER AND SERVANT.

1. ASSUMPTION OF RISK: DEFECTS V. RISK: PLEADING: JURY QUESTION. The mere allegation in his petition that the servant knew the defects in a hand car will not render the petition insufficient without the further allegation that he knew the risk attending such defects; and in such case the assumption of risk or contributory negligence is a question of fact to be determined by the jury. Compton v. Railway, 175.

2. DEFECT IN MACHINERY: INSTRUCTION: EVIDENCE. Evidence is reviewed and held to warrant an instruction submitting the issue whether the hand car left the track because the wheels thereof would not track. Ib.

3. TEST OF NEGLIGENCE: CUSTOM OF MINES: WAIVER: EVIDENCE. The test of negligence in protecting the roof of a drift is the general use and ordinary course adopted in similar mines, and evidence of such usage is proper, and the more so where the defendant in his examination of witnesses adopted such theory, thereby authorizing the plaintiff to reply in rebuttal. Mason v. Mining Co., 367.

4. CONTRACT: DISCHARGE: EVIDENCE. The evidence is reviewed and found to show a contract for a year with a privilege of discharging a servant on two weeks' notice, and discharge without such notice was unlawful and entitled the servant to recover for the balance of the year. Howard v. Shoe Co., 405.

5. DISCHARGE: ISSUE: INSTRUCTIONS. On the evidence and instructions it is held that the theory of the plaintiff was that he was entitled to two weeks' notice and that of the defendant that plaintiff was subject to discharge without such notice. Ib.

6. SAME: EVIDENCE OF EMPLOYMENT: MITIGATION. One employed for a definite period and wrongfully discharged prior to its expiration should accept similar service and his earnings will mitigate the damages, but the servant is not compelled to accept an offer from his former master in such way as would operate an abandonment of his rights under a former contract; and evidence on such offer and refusal to accept, is properly refused. Ib.

7. EVIDENCE: HEARSAY. Though a fact within the knowledge of a witness may in itself be immaterial, it will not authorize the introduction of a mass of hearsay intermingled with it in the same answer and the whole should be ruled out together. Ib.

MECHANICS' LIENS.

1. LOT CONTRACTED FOR: LIEN ON HOUSE: INTEREST IN LOT. Clark's possession of the lot under contract to purchase it, and the erection of a building thereon, subjected the building to a mechanic's lien, and the lot also, to the extent of his interest therein, enforcible according to his interests in either, at the time of the trial. Lumber Co. v. Clark, 225.

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2. SAME: MIS-DESCRIPTION: AMENDMENT. If the petition used "South" instead of "North," and it was evident from the context of the description that the use of the word "South" instead of "North" was a mistake, such mistake could not vitiate the description, if by a proper substitution of the word "North" the description would be completed; besides had it been necessary for a correct description of the property, the court should at the trial have permitted the amendment asked for by appellant for that purpose. Ib.

3. MATERIALMAN: INCUMBRANCES. As to the building apart from the lot, the statute prefers the lien of the materialman to the lien of prior incumbrances upon the land, and permits the sale and removal of said building from the lot in the enforcement of such lien. Ib.

4. SAME: LIEN ON BUILDING: UNAFFECTED BY LIEN ON LAND. The lien enforcible by the materialman or laborer against the building does in no way depend upon the obtention of a lien on the land. Ib.

MERCHANTS. See CRIMINAL LAW, 1, 2.

MORTGAGES. See CREDITOR'S BILL, 1; FRAUDULENT CONVEYANCES, 4-5; INSURANCE, 1; PARTITION, 2, 3; PRACTICE, APPELLATE, 5-6; TRUSTS AND TRUSTEES, 1.

CONSTRUCTION: SUBJECT TO THE MORTGAGE. The fact that the deed to respondent, provided for the payment of the taxes on the land, and mentioned that the property was subject to the mortgage, it is but reasonable, that if respondent was to pay mortgage debt, a covenant to that effect would most likely have been inserted in the deed, and its not having been done, is strong and persuasive evidence that respondent did not agree as a part of the consideration of the deed, to pay off the incumbrances. B. & L. Ass'n v. Grocer Co., 245.

MUNICIPAL CORPORATIONS. See TAX BILLS, 1, 2, 3.

1. CITY OF FOURTH CLASS: SIDEWALK: DESIGNATED MATERIAL. An ordinance directing the building of a sidewalk in a city of the fourth class should designate of what material the particular walk should be constructed, and a provision that it may be of wood, stone or brick is insufficient and the ordinance is void. Gallaher v. Smith, 55 Mo. App. 116, distinguished. Rich Hill v. Donnan, 386.

2. SAFETY OF SIDEWALKS: INSTRUCTION. A city is not required to make its sidewalks absolutely safe but only reasonably so, and instructions to the jury should make this distinction. Wallis v. Westport, 522.

3. CITIES OF THIRD CLASS: EXHAUSTION OF TAXING POWER. Where a city has assessed and collected for the intersection at one corner of the block, it has not thereby exhausted its power to assess and collect for the improvement at the intersection of the other corner of the block. Sedalia v. Coleman, 560.

4. SPECIAL TAXES: SPRINKLING. Special tax against abutting property is based on the idea of an improvement to the property but sprinkling a street is too intangible to be denominated an improvement and a contract for paving and sprinkling a street is *ultra vires* where the contract is entire. Kansas City v. O'Connor, 655.

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5. SAME: ENTIRE CONTRACT. Where the ordinance, the bids, the letting and the contract itself,—all contemplate and provide for the paving, repairing and sprinkling as one work for an entire sum, the transaction is an entirety and a part being illegal and void the whole is void. Smith, P. J., concurring in a separate opinion discussing entire and severable contracts and indivisible and apportionable considerations. Ib.

6. CONTRACTS: ULTRA VIRES. An *ultra vires* contract can not be validated by being partly performed. Ib.

7. SAME: STATUTE OF FRAUDS. *Ultra vires* contracts are prohibited from being made and the corporation can not make them, while contracts within the statutes of frauds are not prohibited from being made but are openly prohibited from being enforced. Ib.

8. SAME: COMPLETELY PERFORMED. Where an *ultra vires* contract has been performed by both sides, the status of the parties has become fixed and the courts will not disturb their condition; but a party can not stand in court upon a contract forbidden by law. Ib.

9. SAME: REMEDY. While municipal corporation can not enforce an *ultra vires* contract or recover damages for its breach, it may recover the consideration parted with on reliance on the contract and thus disaffirm the same. Ib.

10. SAME: SURETY. A municipal corporation can not maintain an action on a contractor's bond against his sureties where the contract is *ultra vires*. Ib.

11. SAME: PRINCIPAL AND SURETY. Where the contract is not unlawful the party who has received the benefit and his sureties are stopped to deny its validity; but a contract to tax abutting property to sprinkle a street is unlawful and the municipal corporation is not estopped to set up *ultra vires*. Ib.

12. SAME: VOID TAX BILLS. Where a city ordinance taxes abutting property to sprinkle a street and issued tax bills in payment thereof, the bills are void and there is no payment or part performance by the city. Ib.

NEGLIGENCE. See AGISTMENT, 2, 3; BANKS AND BANKING, 6, 7, 8; COMMON CARRIERS, 1, 2, 3; EVIDENCE, 1; MASTER AND SERVANT, 3; RAILROADS, 13; TELEGRAPHS, 2.

1. NEGLIGENCE: DUTIES OF LAND OWNER: TRESPASSER: INVITATION: INFANT. A lessee of private premises with only permission to pile ashes and cinders thereon is not liable to an infant who is burned while running over said ashes to reach boys fishing at a near-by pond on the premises and is not guilty of negligence in not fencing the pond, even though it may tend to attract children. Parties entering such private premises without ivitation are trespassers whether old or young, and the proprietor owes them no duty save not to negligently injure after discovering them. Cases considered and distinguished. Smith v. Packing Co., 9.

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2. FOOTMAN ON RAILROAD BRIDGE: PLEADING: EVIDENCE: DEFECTS IN FOOTPATH: LIGHTS. Where the petition by a footman on a railroad bridge counts for injuries resulting from a collision of the end of the pilot beam but says nothing of defects in the footway, evidence of defects on the outer edge of such footway are without casual connection with the injury and are properly rejected; so with regard to the absence of lights on the bridge where the petition alleged that the headlight dazzled and blinded the plaintiff. Skipton v. Railroad, 134.

3. SAME: SIGNALS: NOTICE. Where a footman on a railroad bridge is injured by a collision of the pilot beam, it is immaterial whether the engineer gave the signals if the footman had notice of the coming train. Ib.

4. SAME: PRESUMPTION: WARNING. An engineer observing a footman on the footpath of a railroad bridge has the right to presume such footman will place himself sufficiently distant from the rails to avoid contact with the engine, and words of caution, if within hearing, are as effective to give notice as bells or whistles. Ib.

5. SAME: PASSING TRAIN: CONTRIBUTORY NEGLIGENCE. To stand or walk on a railroad track or so near thereto as to be in the way of a passing train will defeat recovery for injuries received with collision with such train. Ib.

6. CONTRIBUTORY NEGLIGENCE: ENGINEER: PRESUMPTION. Where the driver of a vehicle or a footman is near a railroad track with a passing train thereon, the presumption of negligence causing a collision, is with such driver or footman and not with the engineer of the train who is not compelled to provide against the unexpected, the unusual or the extraordinary, or to anticipate that such driver or footman will negligently expose himself. Ib.

7. FOOTMAN ON RAILROAD BRIDGE: EVIDENCE: DEMURRER. Evidence of a collision resulting in the injury of a footman on a railroad bridge is examined and a judgment sustaining a demurrer to the evidence is affirmed. Ib.

8. CONTRIBUTORY NEGLIGENCE: JURY QUESTION. The question of contributory negligence is usually for the jury unless the facts are clear and indisputable and free from conflicts. Cohen v. Railway, 180.

9. SAME: RAILROAD CROSSING: EVIDENCE: PHYSICAL FACTS. Where the physical facts and the lay of the ground clearly contradicted plaintiff's evidence as to his looking and listening, they should govern, but otherwise the question is for the jury. Ib.

10. PLEADING: NEGLIGENCE. In an action based on the facts showing negligence, if sufficient facts can be gathered from the averments to make out a case, however imperfectly stated, evidence is properly admitted in proof of the averments of the petition. Delaney v. Bowman, 252.

11. INSTRUCTION: ERROR: NOT REVERSIBLE. To warrant a reversal of a judgment on account of an erroneous instruction, the error must be prejudicial to appellant. Ib.

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12. Careful employees: instruction: harmless error. An instruction telling the jury that it was defendant's duty to have careful employees in charge of its cars is not improper in this case, and, if unnecessary, it was harmless. Hansberger v. Railway, 566.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NOTICE. See Banks and Banking, 3; Insurance, 1; Justices' Courts, 7; Negligence, 3; Taxes, 1.

1. Lis pendens: personalty. The doctrine of *lis pendens* applies to personalty except negotiable paper and ordinary articles of commerce. Burnham, Munger Co. v. Smith, 35.

2. Same: basis of doctrine: common law: commencement. In some cases the doctrine of *lis pendens* is based upon the theory of notice, but it really rests upon public policy, preventing the alienation of the property to the prejudice of the parties pending the litigation, and the common law gives effect to the doctrine from the service of the subpoena. Ib.

3. Lis pendens: effect of the doctrine: public policy: party. The sole object of *lis pendens* is to keep the subject of controversy within the power of the court until the decree is entered so as to give effect to the decree and bind an alienee though not a party. Ib.

4. Unrecorded deed: inquiry: record: in pais. One having notice of an unrecorded deed does not satisfy the quality of good faith by examining the record but should inquire of his grantor and the reputed grantee. Griffin v. Railroad, 93.

5. Unrecorded deed: inquiry. One having such knowledge or information as is sufficient to put a man of ordinary prudence on inquiry is to be regarded as having actual notice. Edwards v. Railroad, 96.

6. Same: payment of purchase money: action. One who after receiving notice of an unrecorded deed pays sufficient of the purchase price of land to cover his damages can not maintain an action against the grantee in such unrecorded deed for damages resulting from his entry thereunder. Ib.

7. Tendency of evidence: possession. There was evidence offered by defendant which, taken in connection with his possession, tended to show knowledge. Ib.

8. Subsequent deed: innocent purchaser: burden of proof. A claimant under a subsequent deed invalid unless he is innocent, has the burden of proof to show his innocence where the other party does not assume such burden in its pleading. Ib.

OFFICES AND OFFICERS. See Assignment, 1, 2; Jurisdiction, 4.

Fees: statutory right. No officer is entitled to fees of any kind for any service, unless they are provided for by statute and the statute allowing such fees must be strictly construed. State v. Mason, 239.

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ORDINANCE. See EVIDENCE, 1.

PARTIES. See ACTION, 1; JUSTICES' COURTS, 11, 12; PARTITION, 2.

ACTION: JOINT CONTRACT: CONSIDERATION. Joint obligees must both sue upon the contract, and a contract discussed in the opinion is held to be a joint contract having a joint consideration. Culver v. Smith, 390.

PARTNERSHIP. See BILLS AND NOTES, 1; PRACTICE, APPELLATE, 13.

1. EQUITY SUIT: DISSOLUTION OF PARTNERSHIP: PARTNERSHIP AGREEMENT EXECUTORY. A suit in equity to dissolve a co-partnership agreement, contingent, never consummated and no earned profits for distribution, is not maintainable. Wachter v. Heman, 243.

2. SAME: REMEDY: ACTION AT LAW. Where the agreement to form a co-partnership remains contingent, and is abandoned by one of the parties, the action by the other is one at law for breach of the agreement. Ib.

3. LAW OR EQUITY: PARTNERSHIP. Under the facts in the case at bar the plaintiff's action must be treated as one in equity for the settlement of partnership business. Johnson v. Ewald, 276.

4. SETTLEMENT: ACCOUNTS: ACTION: PLEADING. The rule is that until the accounts of a partnership are settled, and a balance struck, one partner can not maintain an action at law against his co-partner upon a claim growing out of the partnership. Ib.

5. DISSOLUTION: CONTINUING TRUST: EQUITY. An agreement of dissolution of a firm of lawyers provided that each should continue to prosecute the business he had brought to the firm, collect the fees and account to the other members therefor. Held, that this created a relation of agency, or, rather, an implied continuing trust, and that equity will compel an accounting at the suit of one of the parties. Dye v. Bowling, 587.

6. SAME: LIMITATIONS. Where a partner is in ignorance of the amount collected by his former co-partner and the delay in the settlement of the partnership accounts has been acquiesced in and there has been no refusal to settle, the statute of limitations is not a bar to an action in equity for an accounting. Ib.

7. SAME: LACHES. The doctrine of laches does not apply in this case since that doctrine presupposes not only delay but such knowledge of facts on which the claim for relief is based as renders the delay culpable. Ib.

8. LIABILITY OF SECRET AGENT: SUING PARTNER. A secret agent of an undisclosed principal who enters into a partnership becomes a member of such partnership as far as the remaining members ignorant of his agency are concerned and can not at law sue such partnership. Leckie v. Rothenbarger, 615.

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PARTITION.

1. ESTOPPEL: TWO CORPORATIONS WITH SAME OFFICERS. In a partition proceeding in which B. corporation is plaintiff against certain heirs, L. corporation, which after decree interpleads as to certain matters of rents, etc., is not estopped to set up its claim to such rents by the fact that B. corporation in the proceedings for the decree had successfully objected to any evidence relating to said rents, even though the two corporations have the same officers. Burnes v. Ayr Lawn Co., 66.

2. RENTS IN COMMON: MORTGAGEE IN POSSESSION: PARTIES: TAXES AND REPAIRS. Where a mortgagee of an undivided interest in realty is in possession and is compelled for the protection of the entire estate to pay out money for taxes and repairs he has an equitable lien against the other interests for reimbursement for such necessary expenditures; and in an action between the mortgagor's grantee and the other tenants in common said mortgagee is a proper party for the purpose of enforcing against such cotenants their proper proportion of such expenditures. Ib.

3. MORTGAGEE IN POSSESSION: LIEN FOR EXPENDITURES: SPLITTING DEMANDS: COTENANCY. The lien of a mortgagee in possession for necessary outlays in protecting the estate, becomes a part of the mortgage debt and expires with the foreclosure; but a foreclosure can not interfere with the mortgagee's lien on the interest of the other tenants in common for necessary expenditures. Ib.

PAYMENT. See INSURANCE, 15; NOTICE, 6.

PERSONAL INJURY. See DAMAGES, 4; EVIDENCE, 5; MARRIED WOMEN, 1, 2; PRACTICE, APPELLATE, 19, 20, 21; PRACTICE, TRIAL, 7.

PERSONALTY. See NOTICE, 1.

PLEADING. See ACTION, 1; AGISTMENT, 3; BENEFIT SOCIETIES, 3; DIVORCE, 1; FORCIBLE ENTRY AND DETAINER, 2; GARNISHMENT, 1; GUARDIAN AND CURATOR, 8; INJUNCTION, 3; INSURANCE, 8; JUSTICES' COURTS, 1; MASTER AND SERVANT, 1; NEGLIGENCE, 10; RAILROADS, 1, 5, 6; RELEASE, 1; TRESPASS, 1.

1. SAME: EXTENSION OF TIME. Upon all contracts where time is the essence, modifications thereof by waivers, except as to policies of insurance, can only be recovered upon, by alleging and proving such waivers. Trust Co. v. Investment Co., 260.

2. EVIDENCE: INSTRUCTION: VARIANCE: SURPRISE. A petition alleged that upon signal a street car stopped and plaintiff took hold of the handrail and stepped, etc., to get on when the motorman negligently and carelessly let off the brake and caused the car with great force and speed to lurch forward, etc. The evidence showed that the car was moving slowly when the plaintiff attempted to enter. The instruction permitted a recovery if the motorman undertook to stop the car to receive plaintiff and at the time of accident the car was nearly stopped or moving slowly. Held, there was no variance since the allegation of the petition was not unproved in its entirety as the allegation that the car stopped was matter of inducement and the gravamen of the complaint was the negligence in letting off the brake, etc.; but if there be a variance it can not be availed of since appellant filed no affidavit of surprise. Chitty v. Railway, 148 Mo. 64, distinguished. Hansberger v. Railway, 566.

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POSSESSION. See FRAUDULENT CONVEYANCES 7; INJUNCTION, 5; LANDLORD AND TENANT, 2; TRESPASS, 4.

PRACTICE, APPELLATE. See BILL OF EXCEPTIONS, 1; COMMON CARRIERS, 4; COSTS, 1; JUDGMENT, 1, 2; JUSTICES' COURTS, 5; NEGLIGENCE, 11; QUANTUM MERUIT, 1.

1. CONTINUANCE: BILL OF EXCEPTIONS. Where the bill of exceptions is silent as to the action of the court in refusing a continuance, the appellate court must ignore complaints of such action since such application and the rulings of the court thereon are no part of the record proper. State v. Wiley, 61.

2. ABSTRACT: TRANSCRIPT. The appellate court will not go behind the printed abstract into the transcript to ascertain the evidence or proceedings at the trial. To secure a review of these they must be printed in the abstract. State v. Reynolds, 152.

3. SAME: MOTION FOR NEW TRIAL: INSTRUCTIONS. The printing in the abstract of the motion for a new trial in which is inserted instructions given or refused by the court will not authorize a review of such instructions by the appellate court. Recitals in such motion can not be taken as such release authenticated by the bill of exceptions signed by the judge. Ib.

4. EVIDENCE: EMPLOYMENT AND PAYMENT: INSTRUCTION: VERDICT. Where the evidence is conflicting and the issues relating to employment and payment are submitted on proper instructions, the verdict must end the controversy. Young v. Railway, 165.

5. PURCHASER: PROPERTY MORTGAGED: ASSUMPTION OF DEBT. Where the testimony shows that the purchaser took the property just like the seller held it, to pay the dues and the mortgage debt, or to do as he liked about it, and the trial court finding that he did not assume the mortgage debt, such finding will be acceded to and the judgment affirmed. B. & L. Ass'n v. Scudder-Gale Grocer Co., 245.

6. SAME: FINDINGS OF COURT. Every reasonable intendment or inference to be drawn from the evidence in support of the trial court must be adopted. Ib.

7. ERRONEOUS INSTRUCTIONS. Where, on the whole record the judgment is for the right party it should be affirmed notwithstanding the giving of erroneous instructions, which in the opinion of the appellate court did not materially affect the merits or prejudice the appellant. Wagner v. Edison Elec. Co., 287.

8. TRIAL PRACTICE: DISCRETION OF COURTS: LIMITING WITNESSES. It is within the discretion of the trial court to limit the number of witnesses on a particular point, and unless abused appellate courts will not interfere. Such discretion should be exercised with caution lest abuse and injury to the rights of litigants ensue. Markham v. Herrick, 327.

9. GRANTING NEW TRIAL: APPEAL V. WRIT OF ERROR. A writ of error does not lie to review the action of the trial court in granting a new trial though an appeal does. Cases considered and distinguished. Kroeger v. Dash, 332.

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10. ABSTRACT: MOTION FOR NEW TRIAL. The motion for a new trial must show the ruling of the trial court relied upon to reverse the judgment, and the abstract must set out the motion for a new trial before the appellate court will review such ruling. Bush v. Railroad, 357.

11. TRIAL PRACTICE: REMARKS OF ATTORNEY IN HEARING OF JURY: HARMLESS ERROR: JUDGMENT RIGHT. The remarks of counsel in the presence of the jury that the witness could prove another accident at the same place is highly reprehensible, and in a doubtful case would authorize a reversal, but where the judgment is manifestly for the right party such error is harmless. Mason v. Mining Co., 367.

12. EVIDENCE: CONFLICTING: FOLLOWING TRIAL COURT. The trial court is in a better position than the appellate to weigh the conflict in the evidence in this record. Culver v. Smith, 390.

13. PARTIES: REVERSAL: JUDGMENT FOR RIGHT PARTY: RELEASE. Where the judgment is for the right party the appellate court will not reverse by reason of non-joinder of a party if in the designated time the release of such party be filed. Ib.

14. REMARK OF COURT: EXCEPTION. Where no objection or exception is taken at the time to the remark of the court in striking out certain inadmissible evidence, harm can not be said to result from such remark. Howard v. Shoe Co., 405.

15. NO OBJECTION BELOW: TOO LATE ABOVE. Where an appellant fails to call the attention of the trial court to an excess in its finding, it can not raise such question in the appellate court. In re Catron Estate, 416.

16. TRIAL PRACTICE: REFEREE'S REPORT: MOTION FOR A NEW TRIAL. To review the action of a trial court in passing on exceptions to the report of a referee, a motion for a new trial is necessary; and the appellate court will not review any action of the trial court which is not mentioned in such motion. State ex rel. v. Elliott, 458.

17. TRIAL PRACTICE: FINDING OF REFEREE: SPECIAL VERDICT: EVIDENCE. The finding of a referee is a special verdict and a reviewing court will not disturb the result if there be any substantial evidence to support it. Ib.

18. INSTRUCTIONS: HARMLESS ERROR. Where the finding is for the plaintiff and the amount of damages is the contention on appeal, defendant's instructions relating to the merits and not to the damages, though erroneous, are harmless and will not warrant the setting aside of the verdict at plaintiff's instance. Edwards v. Railway, 478.

19. PERSONAL INJURY: FORMER ACCIDENT: JURY QUESTION: EVIDENCE: PRACTICE. The record in this cause discloses abundant evidence to send to the jury the question whether plaintiff's injuries were the result of the accident sued for, or of a former accident; and the appellate court will not step between the defendant and the verdict. Paul v. Railway, 500.

20. TRIAL PRACTICE: WITNESSES UNDER RULE: EXPERTS. Whether experts shall be put under the rule and excluded with other witnesses from the trial, is addressed almost entirely to the discretion of the trial court and the appellate court will not interfere unless the record discloses a clear abuse. Ib.

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21. PERSONAL INJURY: EXAMINATION OF DEFENDANT. There is no absolute right to have a defendant examined in a personal injury case, but the trial court may in the interest of justice permit it, and its action is final unless accompanied with manifest abuse. Ib.

22. NON-PREJUDICIAL ERROR: AFFIRMANCE. Where no error materially effecting the merits of the action is committed, the judgment must be affirmed. Crawford v. Cashman, 554.

23. DIVORCE: FINDING OF TRIAL COURT. In divorce and equity suits it is the duty of the appellate court to weigh and consider all the evidence and direct such change in the judgment as to it seems proper; and while it may defer in some measure to the finding of the trial court it is not bound thereby. Strahorn v. Strahorn, 580.

24. ABSTRACT: INSTRUCTION WITHOUT EVIDENCE. The appellate court does not consider an objection to an instruction based on the ground that it is unauthorized by the evidence unless all the evidence is set out in the abstract, but will presume that there was sufficient evidence to warrant the instruction. Wood v. Kelly, 598.

PRACTICE, TRIAL. See AGISTMENT, 2, 3; BILL OF EXCEPTIONS, 1; CONTRACTS, 4; CRIMINAL LAW, 3; EVIDENCE, 3; FRAUDULENT CONVEYANCES, 8; PRACTICE, APPELLATE, 8, 16, 7; REFEREES, 1; SALES, 3.

1. INSTRUCTIONS: CONFLICTING AND CONFUSING. Instructions manifestly inconsistent and confusing are erroneous. Thummel v. Dukes, 53.

2. AMENDMENT BY INTERLINEATION: RECORD ENTRY: WAIVER. Where plaintiff has leave of court to amend his petition by interlineation and the record sets out the amendment, though in fact it is not entered in the petition and the trial proceeds without objection, the case will be treated as if the amendment had been actually interlined. Oberg v. Ins. Co., 64.

3. COURT AS JURY: INSTRUCTION. Where the court sits as a jury, the parties are entitled to have declarations of law, and the court's rulings in this regard are subject to review. Mussey v. Vanstone, 353.

4. REFEREE'S REPORT: RULINGS OF EVIDENCE. The failure of a referee in his report to make rulings on the introduction of evidence will not warrant the setting aside of such report where such failure does not operate to the prejudice of the accepting party. State ex rel. v. Elliott, 458.

5. SETTING ASIDE VERDICT: SPECIFIED GROUNDS. The trial court in its order setting aside a verdict should specify of record the grounds for such action. Edwards v. Railway, 478.

6. VERDICT: JURY V. COURT. Questions of fact are for the jury as questions of law are for the court, and the court can not usurp the functions of the jury. Ib.

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7. PERSONAL INJURY: EXTENT AND CHARACTER: INSTRUCTION: DEFENDANT'S DUTY. Defendant is not entitled to a verdict simply because plaintiff may fail to prove the extent and character of his injury and striking such word out of the instruction does not leave the jury to give substantial damages; and defendant is at fault if he so words his instructions as to make it necessary to refuse them. Paul v. Railway, 500.

8. INCONSISTENT INSTRUCTIONS. Instructions should be consistent. Wallis v. Railway, 522.

9. CREDIBILITY OF WITNESSES: WEIGHT OF EVIDENCE: INSTRUCTION: FALSUS IN UNO. An instruction relating to the credibility of witnesses and the weight of evidence is fatally defective when it submits to the jury only the credibility of the witnesses appearing before the jury and not those testifying by deposition, and likewise submits the importance of the testimony as well as its weight and allows them to form their belief from all they had seen and heard at the trial, and confines the jury in applying the rule of falsity to the facts mentioned in the instructions and not permitting them to apply the rule to all the facts in the case whether mentioned in the instructions or not. Hansberger v. Railway, 566.

10. INSTRUCTION: EVIDENCE. It is not error to refuse an instruction when there is no evidence to support it. Wood v. Kelly, 598.

11. ACTION: BAR. Where several claims payable at different times arise out of the same transaction, separate actions may be brought as each liability accrues but all that are due must be included in one action or those not included will be barred. Cunningham v. Union, Etc., Co., 607.

12. CONFLICTING EVIDENCE: VERDICT. Where the evidence is conflicting but tends to support the verdict it can not be disturbed. Van Cleave v. Union Elec. Co., 668.

PRESUMPTIONS. See BILLS AND NOTES, 1; GIFTS, 2; NEGLIGENCE, 4, 6; QUANTUM MERUIT, 1.

PRINCIPAL AND AGENT. See ACTION, 1; BROKERS, 1, 2, 3; COMMON CARRIERS, 3; DIVORCE, 6, 7; GIFTS, 1; INSURANCE, 19, 21; PARTNERSHIP, 8.

SCOPE OF AUTHORITY: INSTRUCTION. An agent to buy horses has no authority to borrow money for his principal unless the money is necessary to carry on the business of buying the horses, such as purchase of food for the horses bought; an instruction to this effect is approved. Rider v. Kirk, 120.

PRINCIPAL AND SURETY. See MUNICIPAL CORPORATIONS, 10, 11.

PROHIBITION.

APPEAL: SUPERSEDEAS: CONTEMPT. An appeal from the judgment of the circuit court dissolving a temporary order of prohibition against the execution of a justice's judgment will not operate as a supersedeas so as to prevent the execution of the justice's judgment pending the appeal and authorize the appellate court to punish for contempt the officers and parties enforcing the justice's judgment. Graham v. Conway, 647.

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PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See RAILROADS, 2, 3.

PUBLIC POLICY. See BANKS AND BANKING, 2; NOTICE, 3; WAGES, 1, 2, 3.

PURCHASE MONEY. See NOTICE, 6.

QUANTUM MERUIT.

PRESUMPTION: FAMILY RELATION: APPELLATE PRACTICE. Ordinarily one is presumed to agree to pay for services performed by another, but such presumption does not obtain between members of a family, and there can be no recovery unless the one intended to charge and the other to pay. And where such issues are submitted on sufficient evidence with correct instructions, the verdict is conclusive on the appellate court unless there is manifest prejudice, passion or corruption on the part of the jury. Ratcliff v. Lumpee, 335.

RAILROADS. See COMMON CARRIERS, 4; MASTER AND SERVANT, 1, 2; NEGLIGENCE, 2, 3, 4, 5, 6, 7.

1. KILLING STOCK: SUFFICIENCY OF PETITION: AIDER BY ANSWER. A complaint for killing plaintiff's stock through failure to fence is set out in the petition and held sufficient and that whatever defects, if any it possessed, were cured by the answer. Rowen v. Railroad Co., 24.

2. SAME: FARM CROSSING: INSTRUCTIONS. It is error to submit to the jury the question whether or not a farm crossing is a necessity without a guiding instruction telling the jury what facts make such crossing a necessity. Ib.

3. HANGING GATES: CAUSAL CONNECTION: INSTRUCTION. Though a gate in a railroad fence does not meet the requirements of the statute, yet there must be a causal connection between the defect and the injury to make the railroad liable, and an instruction set out in the opinion is held properly refused because it fails to call the attention of the jury to such connection. Ib.

4. KILLING STOCK: CATTLE-GUARDS: FENCE: INSTRUCTIONS. Where the animal killed gets on the right of way over cattle-guards, evidence and instructions for the plaintiff relating to the condition of the fence are confusing, although defendant's instuction informs the jury there was no evidence of an entrance through the fence, since such instruction adds to the confusion, as also does one given in this case that it was not necessary for plaintiff to show the exact place where the animal entered. Motch v. Railroad, 50.

5. KILLING STOCK: COMPLAINT: DAMAGE STATUTES. An amended statement set out in the opinion is held to state a good cause of action under section 4428, Revised Statutes, 1889, which is supplementary to section 2611 and gives a cause of action for stock killed where the tracks of a railroad are not fenced but might have been. Meadows v. Railroad, 83.

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6. SAME: SUFFICIENCY OF COMPLAINT. A complaint under section 4428, does not have to state in words that the track might have been fenced but it is sufficient if it alleges facts that show it might have been. Ib.

7. KILLING STOCK: AGREEMENT WITH LANDOWNER AS TO FENCE: RUNNING WITH THE LAND. Parol agreements for the arrangement and maintenance of a fence between a railroad and the abutting landowner do not run with the land and can not bind a grantee. Ib.

8. FORFEITURE OF CHARTER: BURDEN OF PROOF. The burden of proof to show that a railroad charter has been forfeited by failure to begin construction, etc., is upon the party asserting it. In the absence of such evidence, the court can not assume the forfeiture. Edwards v. Railroad, 96.

9. APPROPRIATION OF RIGHT OF WAY: DAMAGES FOR FLOODING. Where a railroad acquires the title to the right of way from defendant's grantor he can not recover for the appropriation of the land or damages to the farm resulting therefrom, but he may recover for the unskillful construction resulting in the overflowing of the land. Ib.

10. RAILROADS: FENCING STATION GROUNDS: JURY QUESTION: EVIDENCE. A railway company is not required to fence its tracks and put in cattle-guards at necessary switches when to do so would endanger the safety of its employees, and the extent of such switches is a question for the jury, and the evidence in this case was sufficient to send the issue to the jury. Glasscock v. Railroad, 146.

11. SAME: CATTLE-GUARDS BETWEEN SWITCHES: INSTRUCTIONS. Whether it is proper to construct cattle-guards between switches depends upon circumstances, and an instruction should not declare such construction unlawful of itself. Ib.

12. STREET: DUTY TO STOP CAR: INSTRUCTION: HARMLESS ERROR. An instruction that it is the duty of a street car when signalled to stop and receive the passenger and not move until he is in a place of safety, is held in this case a harmless abstraction. Hansberger v. Railway, 566.

13. SAME: ENTERING MOVING CAR: CONTRIBUTORY NEGLIGENCE: JURY QUESTION. To attempt to get on a car in rapid motion is negligence *per se;* but whether to undertake to get on a car barely moving or not moving at a greater rate than from one to three miles an hour is negligence, is a mixed question of law and fact and should be submitted to the jury under proper instructions. Ib.

14. EVIDENCE: PLEADING: CONSTRUCTION OF STEP. In an action to recover for personal injury, evidence as to the fault of construction of the step to the street car is admissible where the petition counts on negligence in suddenly starting the car. Ib.

RECOUPMENT. See SALES, 4.

REDEMPTION. See CHATTEL MORTGAGE, 2.

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REFEREES. See PRACTICE, TRIAL, 4.

ACTION, LEGAL OR EQUITABLE: REPORT OF REFEREE: PRACTICE, TRIAL: PRACTICE, APPELLATE. The findings of fact of the referee in an equitable action are like the special verdict of a jury in a chancery case, that is advisory only, to be received or rejected by the trial or appellate court, according to its conceptions of the facts upon a consideration of the entire testimony. On the other hand, if the case is to be tried as one at law, then the findings of the referee as to the facts, must be sustained if supported by substantial evidence. Johnson v. Ewald, 276.

RELEASE. See INSURANCE, 9; PRACTICE, APPELLATE, 13.

RELEASE: PAYMENT BY JOINT OBLIGEE: PLEADING: PRACTICE. An answer asked a credit for a payment made by one of the joint obligees after suit brought but pleaded no release on that ground. Defendants can not change their position in the appellate court and claim such payment as a discharge. Culver v. Smith, 390.

REMEDY. See ADMINISTRATION, 9; MUNICIPAL CORPORATIONS, 9.

REPAIRS. See PARTITION, 2.

REPLEVIN. See CHATTEL MORTGAGE, 1.

RIGHTS OF THE PARTIES. All the rights of the parties could be adjusted in an action of replevin. Turner v. Brown, 30.

REPRESENTATIONS. See INSURANCE, 16, 18, 19.

ROADS AND HIGHWAYS. See TRESPASS, 3.

RESCISSION. See BANKS AND BANKING, 10; CONTRACTS, 11.

SALES. See CHATTEL MORTGAGES, 1.

1. FRAUD: AFFIRMING CONTRACT: WAIVER: DEBTOR AND CREDITOR. Though a sale be avoidable by reason of the fraud of the vendee, the vendor by affirming the contract and taking security for the purchase money waives all his rights growing out of the fraud and becomes a simple contract creditor. Burnham, Munger & Co., v. Smith, 35.

2. BREACH OF WARRANTY: MEASURE OF DAMAGES: INSTRUCTIONS. Where a chattel sold is not as represented the measure of damages is, if it is valueless, the whole of the purchase price; but if it is good for anything, the measure is the difference between its real worth and the price given; and an instruction directing a finding if the chattel was worthless for the purpose for which it was sold, is erroneous. Thummel v. Dukes, 53.

3. BILL OF: CHANGE OF THEORY. A party whose original petition based his title on a chattel mortgage and whose amended petition only claims title without stating the source and who in fact held under the mortgage, can not, when the mortgage is declared void, claim under a bill of sale taken on the same day that attachments were issued against the vendor. Lowrance v. Barker, 125.

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4. IMPLIED WARRANTY: EXPRESS AGREEMENT: RECOUPMENT. The sale of a harvester carries with it an implied warranty that the machine was reasonably fit for the purpose for which it was sold, and in so far as it falls short of this warranty its diminution in value goes to the reduction of the purchase price; and a subsequent agreement to fix the harvester so that it will bind, etc., at the next harvest is not inconsistent with the implied warranty but is distinct and separate therefrom and the two can stand together. Miller v. Hunter, 632.

5. SAME: PARTIAL PAYMENT: FAILURE OF CONSIDERATION. Where in an action to recover the purchase price of a machine the partial payments equal the value of the machine, there is such failure of the consideration that there can be no recovery. Ib.

SCHOOLS.

1. FORMATION OF NEW DISTRICT: RIGHT OF APPEAL. Where on an application to form a new district by detaching certain sections of land from each of two districts, both districts vote against the proposition, but a majority of the voters affected by the change in one of the districts voted in favor of such new district, an appeal lies to the commissioner whose decision is final. State ex rel. v. Burford, 343.

2. LEVYING TAXES: DUTY OF COUNTY CLERK: JUDGMENT OF COMMISSIONER. The county clerk is required to assess the amount of estimates returned to him by a district on the taxable property therein, and he can not assess one district with the estimates of another, nor can he ignore the decision of the commissioner forming a new district. Ib.

3. NEW DISTRICT: MEETING OF VOTERS. The fact that the qualified voters of a new district did not meet within fifteen days after the decision of the commissioner will not destroy such new district; and, until the districts affected by the formation of the new district have notice of the commissioner's decision establishing the same, such new district is not formed and a meeting within fifteen days of such notice is sufficient under the statute. Ib.

4. ORGANIZATION OF NEW DISTRICT: PLAT. Where the voters of a new district meet, make their estimates, etc., the failure to adopt a plat can not have the effect to render nugatory the action of the commissioner in forming a new district. Ib.

SELLING LIQUOR. See CRIMINAL LAW, 1.

SPLITTING DEMANDS. See INSURANCE, 10; PARTITION, 3.

SOLVENCY. See TAXES, 3.

SOUND MIND. See GIFTS, 3.

STATUTE OF FRAUDS. See MUNICIPAL CORPORATIONS, 7.

STENOGRAPHERS. See COSTS, 3.

STEWARD. See GUARDIAN AND CURATOR, 7.

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ST. LOUIS CRIMINAL COURT. See JURISDICTION, 1, 2, 3.

SUPERSEDEAS. See PROHIBITION, 1.

SURPRISE. See PLEADING, 2.

TAX BILL. See MUNICIPAL CORPORATIONS, 4, 5, 12.

1. CITY OF FOURTH CLASSS: SIDEWALK: ENGINEER'S ESTIMATE. An engineer of a city of the fourth class can not delegate to a private citizen his duty and authority to make an estimate for a proposed sidewalk, and an estimate by such citizen with his permission will not authorize the contracting and building of said walk and the issuing of tax bills therefor. Rich Hill v. Donnan, 386.

2. SAME: SIDEWALK: DESIGNATED MATERIAL. An ordinance directing the building of a sidewalk in a city of the fourth class should designate of what material the particular walk should be constructed, and a provision that it may be of wood, stone or brick is insufficient and the ordinance is void. Gallaher v. Smith, 55 Mo. App. 116, distinguished. Ib.

3. SPECIAL TAX BILLS: STREET INTERSECTION: LIABILITY FOR IMPROVEMENT. In cities of the third class by section 108 of the Laws of 1893, lots in each block, when the street in front thereof is paved, are each liable to assessment for such improvement for two quarters of street intersections, one at each corner of the block; and this, though said improvements are made at different times under different ordinances, and the first improvement was ordered under the general statutes governing cities of the third class, since the act of 1893 has not changed such former law but stated the details more fully. Sedalia v. Coleman, 560.

TAXES. See PARTITION, 2; SCHOOLS, 2.

1. ASSESSMENT: APPEAL: NOTICE: GLASGOW. Where the taxpayer and assessor are content with the former's list and there is no appeal, the board of revision and appeals has under the charter and ordinances of the city of Glasgow no authority in any way to change such list—especially so without giving notice of its sitting. Noll v. Morgan, 112.

2. CONSTRUCTION OF REVENUE LAWS. Laws of assessment and collection of the revenue should be construed with reasonable strictness and when power is conferred upon a particular tribune to perform a specified act such enactment is mandatory in its nature and must be strictly observed, and a departure will be fatal. Ib.

3. INVALID ASSESSMENT: LEVY: INJUNCTION: SOLVENCY. Where the collector seizes the property of a taxpayer on his refusal to pay an invalid assessment and is threatening to sell the same, such collector will be restrained by injunction and his solvency or insolvency is immaterial. Ib.

TELEGRAPHS.

1. OWNERSHIP OF LINES: EVIDENCE. Evidence in this record is held sufficient to constitute a *prima facie* case of ownership of certain telegraph lines in the defendant and to put it on its defense. Larkin v. Telegraph Co., 155.

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2. NEGLIGENCE: INSTRUCTION: JUDGMENT: HARMLESS ERROR. An instruction set out in the opinion if faulty in assuming the ownership of certain telegraph lines is not such error as materially to affect the merits of the action and work a reversal, since the judgment is for the right party. Ib.

TITLE.

CLOUD UPON TITLE: GRANTEE OF HOMESTEAD: JUDGMENT LIEN: PAROL EVIDENCE. The grantee of a homestead by deed with condition subsequent can maintain a bill to remove from his title a cloud cast by transcript judgments of a justice against his grantor filed in the circuit clerk's office when it would require parol evidence to show the invalidity of such lien. Rogers v. Bank, 377.

TRESPASS. See INJUNCTION, 5.

1. PLEADING: TREBLE DAMAGES: COMMON LAW. A complaint for trespass alleging that the defendant without leave entered, etc., and carried away, etc., states an action at common law and not under the statute since it omits the allegations that the defendant had no "interest in the goods" and that he entered upon land "not his own," and it is error to treble the damages on the verdict. Pitt v. Daniel, 168.

2. EVIDENCE: INTENTIONAL WRONG. In an action of trespass under the statute for treble damages, evidence tending to show that the alleged trespass was committed under belief of right is admissible not to defeat a recovery but for the consideration of the court on the trebling of damages. Ib.

3. ROAD OVERSEER: EVIDENCE. While a road overseer may take stones out of the road for its repair and call persons to his aid for that purpose, neither he nor his hands can appropriate such stones to private use; but a hand sued in trespass for the appropriation of such stone may show in evidence the order of the overseer to prevent the trebling of damages by the court under the statute. Ib.

4. POSSESSION: TRESPASSER: INSTRUCTION: JURISDICTION. An instruction that bare possession of personal property will warrant a verdict against a sheriff's levy under an attachment writ, is improper where the court issuing the writ has jurisdiction. Rubber Co. v. Hutchison, 603.

TRESPASSER. See NEGLIGENCE, 1.

TRUSTS AND TRUSTEES. See BANKS AND BANKING, 3; PARTNERSHIP, 5.

STAKEHOLDER: INTERPLEADER: COLLUSION. A trustee in a deed of trust who has in his hands a surplus after foreclosure and who secures the appointment of an administrator of his grantor's estate in order that such administrator may claim such surplus, can not maintain a bill of interpleader against the suit of his grantor's heirs to recover such surplus on the ground of the administrator's claim. Swain v. Bartlett, 642.

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ULTRA VIRES. See MUNICIPAL CORPORATIONS, 6, 7, 8, 9, 10, 11, 12.

UNDUE INFLUENCE. See GIFTS, 2.

USURY. See FRAUDULENT CONVEYANCES, 1.

VARIANCE. See AGISTMENT, 3; PLEADING, 2.

VENDOR AND VENDEE. See MORTGAGES, 1; PRACTICE, APPELLATE, 5, 6.

VENUE. See JURISDICTION, 5.

VERDICT. See PRACTICE, TRIAL, 12.

WAGES. See GARNISHMENT, 3, 4, 5.

1. ASSIGNMENT OF: PUBLIC POLICY. An assignment of wages to be earned under an existing contract of employment made in good faith and for valuable consideration is valid, and it is immaterial that the assignor works from day to day and for no specified time. Hax v. Plaster Co., 447.

2. SAME: EQUITY: EXPECTANCY. In equity an assignment of wages that are a mere expectancy or possibility is valid as an agreement to assign; and when such wages are earned and in fact paid to the assignee, the transaction is valid and binding. Ib.

3. SAME: ACCEPTANCE: CONTINUANCE: GARNISHMENT. An assignment "of all claims and demands which I now have and which I may have at any time between the date hereof and July, 1899," which is accepted by the employer of the assignor without reference to any particular contract, attaches to all the earnings of the assignor during his continuous service for the employer; and the assignor's creditors stand in his shoes and have no greater rights to the assigned wages than he, and the service of the garnishment on the employer did not suspend the assignee's right to the assigned wages. Ib.

WAIVER. See ACCOUNT, 1; FORCIBLE ENTRY AND DETAINER, 2; INJUNCTION, 2; JUSTICES' COURTS, 1, 3; MASTER AND SERVANT, 3; PLEADING, 1; PRACTICE, TRIAL, 2; SALES, 1.

WARRANTY. See INSURANCE, 14, 15, 16; SALES, 2, 4, 5.

WILLS.

1. CONSTRUCTION OF: INTEREST OF LEGACY: ANNUITY. The general rule that interest is not payable on a legacy until one year after the death of the testator does not apply where the legacy consists of the net interest or income of a given sum. The interest being the legacy itself is collectible from the death. In re Catron's Estate, 416.

2. SAME: CONTEST: ESTOPPEL. A legatee whose legacy consists of interest on a given sum is not estopped to collect such sum by reason of the fact that he contested the will. Such estoppel, if allowable at all, could only apply to the interest on such enterest for the time the contest delayed payment. Ib.

WITNESSES. See EVIDENCE, 3; INJUNCTION, 3; PRACTICE, APPELLATE, 19; PRACTICE, TRIAL, 9.

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subse-

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quent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is locketed for hearing, file with the Clerk of this Court five copies of the ame; and the counsel for appellant, or plaintiff in error, may, if he deires, within five days after the service on him of the respondent's, or efendant in error's, abstract and brief of aforesaid, file and serve a rply thereto in the manner aforesaid; and the evidence of the service oi such abstracts, briefs, points and authorities, as above required, shll be filed by each party at the time of filing said copies with the Clrk.

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RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall b served upon the opposite counsel; but no motion for a rehearing sha be filed after the final adjournment of the Court.

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RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts, and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before mak- the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Attest:

L. F. McCoy, Clerk.

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Rules of Practice in the St. Louis Court of Appeals.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the*

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regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same (unless the court, upon an inspection of the record, should become satisfied that the printing of the entire record was unnecessary for a full understanding of the points presented). The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reason-

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ableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

"The appellant, or plaintiff in error, shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court four copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve, a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk."

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGED ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court,

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and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the

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commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 26.—In view of the rulings of the Supreme Court, confining the jurisdiction of this court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this court and excepting also writs of habeas corpus and prohibition, will hereafter be issued by this court or any of the judges thereof, except in cases where the application of such writs can not be effectually presented to the Circuit Court or the Supreme Court, or some judge thereof. Nor will any writ of prohibition be issued in any case whereof the Supreme Court has appellate jurisdiction.

RULE 27.—Garnishees claiming any allowance in this Court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditure paid or incurred upon the appeal.

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